Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

Richard Ter Maat, Incorporated, AAA Disposal Systems, Incorporated, and MIG Investments, Incorporated.
Petitioners,

v.

Browning-Ferris Industries of Illinois, Incorporated, Apache Products Company, Tamms Industries, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a corporate officer of a landfill company, who was not shown to have engaged in any violation of law, and whose activities were of an administrative nature in the performance of his duties as a corporate officer, can be held liable as an "operator" under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9607(a).

II. Whether a single share of contribution liability can be assessed jointly and severally against three distinct parties which had differing connections to, and responsibilities toward, the activities at a landfill site pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9613(f)(1).

III. Whether the appellate court properly invoked the *Law of the Case* doctrine in its refusal to consider the merits of the appeal from the District Court.

PARTIES TO THE PROCEEDINGS

Petitioners

The Petitioners are AAA Disposal Systems, Inc., a dissolved Illinois corporation, M.I.G. Investments, Inc., a dissolved Illinois Corporation, and Richard Ter Maat. Neither of the dissolved corporations had a parent corporation nor did any publicly held corporation own 10% or more of either corporation's stock.

Respondents

The Respondents are:

Browning-Ferris Industries of Illinois, Inc., a Delaware corporation with its principal place of business in Illinois. The parent company of Browning-Ferris Industries of Illinois, Inc. is Browning-Ferris Industries, Inc., a publicly traded corporation. It is believed that Browning-Ferris Industries, Inc. has been acquired by, or merged with, another corporate entity since the inception of this case. However, no documentation has been filed with the District Court regarding the terms of such acquisition or merger.

Apache Products Company, a South Carolina corporation with its principal place of business in Anderson, South Carolina. The parent company of Apache Products Company is Jasper Corporation.

Tamms Industries, a Delaware corporation with its principal place of business in Kirkland, Illinois.

DaimlerChrysler Corporation (f/k/a Chrysler Corporation) a Delaware corporation with its principal place

of business in Auburn Hills, Michigan. The parent company of DaimlerChrysler Corporation is DaimlerChrysler AG, a publicly traded corporation.

The Ingersoll Milling Machine Company, an Illinois corporation with its principal place of business in Rockford, Illinois. The parent company of Ingersoll Milling Machine Company is Ingersoll International, Inc. It is believed that Ingersoll International, Inc. has been acquired by, or merged with, another corporate entity since the inception of this case. However, no documentation has been filed with the District Court regarding the terms of such acquisition or merger.

Newell Operating Co. (f/k/a Amerock Corporation), a Delaware corporation with its principal place of business in Freeport, Illinois. The parent company of Newell Operating Co. is Newell Co., a publicly traded corporation.

Camcar Division of Textron, Inc., a Delaware corporation with its principal place of business in Rockford, Illinois. The parent company of Camcar Division of Textron Inc. is Textron, Inc., a publicly traded corporation.

Twin Disc, Inc., a Wisconsin corporation with its principal place of business in Racine, Wisconsin. Fidelity Management & Resources Corp., a publicly traded company, owns 10% or more of the stock of Twin Disc, Inc.

Wilmar Processing, Inc. This corporation was listed as a Respondent in the brief filed with the Seventh Circuit in February, 2001 but was not named as a Respondent in the briefs filed before that court in February, 1999. No additional information regarding this corporate entity is known to the Petitioners.

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The District Court issued a lengthy Memorandum Opinion and Order on July 30, 1998 following a bench trial which is reported at 13 F.Supp.2d 756 (N.D. Ill., WD 1998). An appeal to the United States Court of Appeals for the Seventh Circuit resulted in a partial reversal and remand on certain limited issues. That opinion is reported at 195 F.3d 953 (7th Cir. 1999). A previous Petition for Writ of Certiorari to the United States Supreme Court was denied at 529 U.S. 1098 (2000). The District Court thereafter addressed the remanded issues in a Memorandum Opinion and Order entered on November 8, 2000. That opinion is unpublished but can be found at 2000 WL 1716330 (N.D. Ill., WD 2000). A subsequent appeal to the United States Court of Appeals for the Seventh Circuit resulted in the issuance of an order affirming the District Court upon application of the *Law of the Case* Doctrine. The Seventh Circuit Order is unpublished but can be found at 2001 WL 599695 (7th Cir. 2001). Copies of these Memorandums, Opinions, and Orders are found in the Appendix.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its Order on May 30, 2001. This Petition for Writ of Certiorari is filed within 90 days of entry of that Order. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254(1) and 2106.

STATUTORY PROVISIONS INVOLVED

Due to the length of the statutory provisions involved, the text of the following statutes is reproduced at Appendix H

as allowed by Supreme Court Rule 14(1)(f):

42 U.S. C. §9601(20)(A)

42 U.S.C. §9607(a)

42 U.S.C. §9613(f)(1)

STATEMENT OF THE CASE

M.I.G. Investments, Inc. (MIG) was an Illinois corporation which held various state-issued permits to operate the MIG/Dewane Landfill near Belvidere, Illinois. AAA Disposal Systems, Inc. (AAA) was one of several waste hauling companies that utilized the landfill during its period of operation. Richard Ter Maat was a minority shareholder in both corporations who also served as an officer of each.

There were four principals associated with MIG and AAA. Each had a distinct area of expertise and responsibility to the two companies. Edward Foerster, another minority shareholder, was responsible for the maintenance of the vehicles belonging to each company. Mr. Foerster was also responsible for the day-to-day activities at the MIG/Dewane Landfill. Jack Ter Maat, now deceased, was another minority shareholder who was primarily responsible for the solicitation and servicing of municipal waste hauling contracts. He was also involved in the operation of an unrelated waste hauling company which served the Milwaukee, Wisconsin area. Mr. Philip Stephenson was an accountant who served as the Controller of both corporations. He was primarily responsible for financial issues. Richard Ter Maat, the son of Jack Ter Maat, was primarily responsible for the day-to-day activities of the hauling company, AAA, as well as

implementing an ongoing program of acquiring smaller waste haulers.

The MIG/Dewane Landfill closed in 1988. It was thereafter named to the National Priority List for inclusion on the list of sites to be remediated under the federal Superfund program. The Respondents entered into an Administrative Order on Consent with the U.S. Environmental Protection Agency. Those entities initiated this action for contribution against the Petitioners pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 *et seq.* (CERCLA).

The District Court entered judgments against each of the Petitioners in the sum of $4,136,685.38 and found them liable for over one-quarter of the future expenditures at the Site.

ARGUMENT FOR ISSUANCE OF WRIT OF CERTIORARI

I. Whether a corporate officer of a landfill company, who was not shown to have engaged in any violation of law, and whose activities were of an administrative nature in the performance of his duties as a corporate officer, can be held liable as an "operator" under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9607(a).

The various Circuit Courts of Appeal have adopted a variety of tests for determining who is an "operator" as contemplated by Section 101 of CERCLA, 42 U.S.C.

§9601(20)(A). The United States Supreme Court recently offered guidance on this issue when it decided the case of *U.S. v. Bestfoods,* 524 U.S. 51 (1998). However, *Bestfoods* was decided on a narrow issue not directly involved in this appeal. *Bestfoods* answered the question of when a parent corporation can become liable, as a CERCLA "operator," for the actions of a wholly-owned subsidiary which is the operator-in-fact of a facility. The issue presented in this case involves a determination of when a corporate officer will incur "operator" liability in addition to the corporation by which he is employed.

In *Bestfoods*, as here, there was an identifiable, and undisputed, "operator" as envisioned by CERCLA. *Bestfoods* looked to the step above the operator-in-fact level and established the standards by which a corporate parent could be deemed a joint operator with its subsidiary. The standard announced in *Bestfoods,* while instructive, is not directly transferable to the step below the operator-in-fact level, which is the issue presented by this case. It is also an issue of some importance. There are any number of individuals employed in the waste disposal industry, or who are involved with their employer's waste disposal program, who are plagued with the uncertainty of potentially staggering personal liability of the kind imposed on Mr. Ter Maat.

The District Court initially absolved Mr. Ter Maat of any liability under CERCLA in a well-reasoned opinion which summarized the myriad of facts presented at trial. *Browning-Ferris Industries of Illinois, Inc., et al. v. Ter Maat, et al.,* 13 F.Supp.2d 756 (N.D. Ill., WD 1998). On appeal, the Seventh Circuit affirmed the finding of the trial court which had declined to impose indirect "operator" liability on Mr. Ter Maat through state veil-piercing law. However, it remanded as to his potentially direct "operator" liability under

CERCLA, which the appellate court did not believe was adequately addressed. *Browning-Ferris Industries of Illinois, Inc., et al. v. Ter Maat, et al.*, 195 F.3d 953 (7th Cir. 1999).

On remand, the District Court refused to take new evidence on the issues raised by the Seventh Circuit opinion. The District Court reviewed only the evidence adduced at trial and issued a second order by which it entered judgment against Mr. Ter Maat personally.

It is imperative that this Court resolve the confusion that exists among the various approaches announced by the circuit courts. The intermediate courts of appeal have formulated at least two tests, and possibly three, for determining when an individual will be deemed a CERCLA "operator." In addition, this Court's language in *Bestfoods*, while not directly dispositive, presents yet another potential variation on this issue. The record in this case is clear and concise, and is thus a worthy vehicle for announcing a single, national, standard for the resolution of this issue.

One of the approaches taken by the intermediate courts of appeal is referred to as the "authority to control" test. That approach holds that any individual who has the authority to control a company's waste disposal activities, even if that authority is never exercised, will be deemed liable as a CERCLA "operator." Representative of this approach is *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992) and *U.S. v. Carolina Transformer Co.*, 978 F.2d 832 (4th Cir. 1992).

Another approach taken by the courts of appeal has been the "actual control" test. Liability under this standard is predicated on proof that the individual exerted actual control over the affairs of the corporation regarding waste

handling rather than merely possessing the right to exert such control. Representative of this approach is *U.S. v. Northeastern Pharmaceutical & Chemical Co., Inc.* 810 F.2d 726 (8th Cir. 1986) (commonly cited as *"NEPACCO"*).

An analysis of these two approaches leads to an obvious and undeniable conclusion: Both are based on the premise that the determination of "operator" status under CERCLA requires the district courts to apply a "reverse *respondeat superior*" doctrine. That is, under both tests an identifiable person within the employ of a corporation will become additionally liable under CERCLA.

The "authority to control" test specifically provides for the imposition of liability against any employee who could, if he chose, exert control over the company's waste handling activities. The "actual control" test casts a smaller net, but nevertheless ensnares any individual who actually engages in activities related to the company's waste control or handling procedures. In neither instance is there any consideration of the quality of that individual's activities. That is, neither test inquires whether the individual actually caused harm to the environment, or whether he disregarded any requirement of the law. The sole emphasis is on the extent to which that person could have, or did, become involved in waste handling activities.

It may be that this Court's decision in *Bestfoods* has effectively overturned the approaches of the courts of appeal as summarized above. However, if that entire area of law has been effectively negated, there has been no specific admonition to that effect to the district courts. That, alone, would justify this Court's exercise of its discretionary jurisdiction in order to bring order to the present uncertainty regarding personal liability issues.

There appears to be yet a third approach adopted by the circuit courts to resolve the secondary liability issue presented here. That approach was advanced in two cases, *Riverside Market Development Corp. v. International Building Products, Inc.*, 931 F.2d 327 (5th Cir. 1991) and *Sidney S. Arst Co. v. Pipefitters Welfare Education Fund,* 25 F.3d 417 (7th Cir. 1994). The approach in those cases might be termed a "fault" analysis, although they are probably more properly described as relying on a "causation" analysis.

Riverside Market requires a determination of whether there is a nexus between the actions of an individual acting on behalf of a corporation, and the environmental harm at issue:

> Under traditional concepts of corporate law, the principle of limited liability would protect officers or employees like Prescott from being held responsible for the acts of a valid corporation. However, CERCLA prevents individuals from hiding behind the corporate shield when, as "operators," *they themselves actually participate in the wrongful conduct prohibited by the Act.* (*Riverside Market* at 330, emphasis added.)

As if to emphasize its reliance on a fault standard, the Fifth Circuit stressed:

> In determining liability in cases like the one now before us, *we must look to the extent of the defendant's personal participation in the alleged wrongful conduct.* (Id. at 330, emphasis added.)

It must be appreciated that the issue in *Riverside Market* wasn't the liability of the corporation, which was assumed. Rather, it was centered on the potential liability of an individual who performed various duties for the corporation within the scope of his employment. Given that the corporation is liable, the analysis as to a corporate officer's liability can properly be viewed as a question of secondary liability.

The *Riverside Market* Court required a determination of whether the individual had actually engaged in "wrongful conduct." That standard seems totally reasonable, especially when viewed in the context of the "authority to control" or "actual control" tests which impose liability based on one's *status* rather than one's *actions*.

The Seventh Circuit panel which decided the *Arst* case adopted a similar standard. It, too, looked to actions over status. That Court held:

> Yet even under these liberal pleading standards, a complaint does not automatically state a claim for CERCLA "operator" liability merely by being directed against persons holding management or like positions.
>
> .....
>
> To survive a motion to dismiss a plaintiff must allege that persons associated with the corporation *directly and personally engaged in conduct that led to the specific environmental damage at issue in the case. Without such direct, personal involvement,* the corporation and not the associated individuals must be

> regarded as owning or operating the hazardous waste site in question.
>
> .....
>
> Thus, a plaintiff does not state a claim for owner or operator liability if she merely alleges that certain individuals had general corporate authority or served generally in a supervisory capacity. *Active participation in, or exercise of specific control of, the activities in question must be shown.* (*Arst* at 421-422, emphasis added.)

The *Arst* decision is comparable to the emphasis of *Riverside Market* on "wrongful conduct." It differs slightly, though, in that *Arst's* emphasis is on "conduct that led to the specific environmental damage at issue." That seems to suggest a causation, rather than a true fault, standard. Again, such an approach is certainly more reasonable because it at least seeks a causal connection between a person's activities and the imposition of liability.

The *Ter Maat* panel of the Seventh Circuit took an initial approach which was consistent with the *Arst* panel's emphasis on actions over status. Regarding the implicit reverse *respondeat superior* emphasis of the authority to control and the actual control tests, the *Ter Maat* panel stated:

> Which is not to say, however, that the officer is automatically liable for the acts of the corporation; there is no doctrine of "superiors' liability," comparable to the doctrine of respondeat superior, that is, the employer's strict liability for torts of the

employee committed within the scope of his employment.

So if Ter Maat operated the landfill personally, rather than merely directing the business of the corporations of which he was the president and which either formally, or jointly with him (as well as with each other), operated it, he is personally liable. (*Ter Maat* at 956.)

The standard imposed in the forgoing language would seem to be consistent with the rationale of *Arst* and *Riverside Market* with their emphasis on conduct rather than status. However, the *Ter Maat* panel then embarked on a clarification which negated the standard which it purported to establish. The court analogized personal liability to the operation of a train:

If an individual is hit by a negligently operated train, the railroad is liable in tort to him but the president of the railroad is not. Or rather, not usually; had the president been driving the train when it hit the plaintiff, or had been sitting beside the driver and ordered him to exceed the speed limit, he would be jointly liable with the railroad. If Ter Maat did not merely direct the general operations of M.I.G. and AAA, (reference omitted) or specific operations unrelated to pollution, (citations omitted) but supervised day-to-day operations of the landfill—for example, negotiating waste-dumping contracts with the owners of the wastes or directing where the wastes were to be dumped or *designing or directing measures for preventing toxic substances in the wastes*

> *from leeching into the ground and thence into the groundwater---then he would be deemed the operator, jointly with his companies, of the site itself.* (*Ter Maat* at 956, emphasis added.)

The latter language established a substantially different standard than the general statements which preceded it. That is, it was uncontested that Mr. Ter Maat, as an officer of both the hauling company and the landfilling company, had issued directives which required the companies' employees to follow environmental guidelines. For example, as an officer of AAA he conducted monthly safety meetings at which one topic of discussion was allowable waste products that could be picked up at curbside. He instructed his drivers to leave such things as paint cans or car batteries at the curb because such items were not allowed in the landfill.

Nevertheless, the circuit court held that Mr. Ter Maat would be liable as an "operator" under CERCLA if he "design(ed) or direct(ed) measures for *preventing* toxic substances in the wastes from leeching into the ground." That is, the consequence for insisting on compliance with the law has been the entry of a judgment against Mr. Ter Maat in excess of four million dollars. In no other setting has a person ever been shown to have complied with the law, been convicted of such compliance, and received such a harsh sentence.

To use the railroad analogy of the Seventh Circuit, the president of the railroad company would not be liable if a train strikes a pedestrian due to improper speed. However, had the president "design(ed) or direct(ed)measures for *preventing*" accidents, such as issuing a directive that all trains are to be operated within applicable speed limits, he would have taken an action which would be tantamount to

"operating" the train, and thus be liable. It would be of no import that the directive this hypothetical president issued would have been designed to ensure compliance with the law. The only inquiry, under the *Ter Maat* standard, is whether he addressed the issue at all. If that question is answered in the affirmative, even if his approach was to insist on compliance with the law, he would be found guilty and punished. The Seventh Circuit has thus set a standard by which the mere consideration of the law, and implementation of it, is the standard by which liability is imposed. The emphasis has been effectively shifted from a consideration of who is the operator-in-fact of a site to an inquiry of whether someone has ever thought about the operation of a site.

It should be an important consideration for this Court that there was not one scintilla of evidence to indicate that Mr. Ter Maat violated any environmental laws as an officer of either MIG or AAA. He was shown to have exclusively involved himself with managerial issues, such as meeting with state regulators and obtaining the permits required by the State of Illinois. Indeed, the uncontradicted evidence was that another shareholder was the corporate officer responsible for the day-to-day activities at the landfill. In spite of this evidence, a judgment has been issued against Mr. Ter Maat in excess of four million dollars, along with a determination that he is additionally responsible for over a quarter of the future costs to be incurred at the site.

The intermediate courts of appeal are in disarray when considering the circumstances under which a corporate officer will be liable as a CERCLA "operator" along with his employer. This Court's resolution of the *Bestfoods* case offered language that could potentially touch on the corporate officer issue, but which is not directly applicable to this inquiry. As this case so clearly demonstrates, these are not

mundane or academic issues. A corporate officer, who wasn't even the person responsible for the company's landfill on a day-to-day basis, has a judgment against him for several millions of dollars. Leaving the law in this state of flux is a luxury that individuals in the waste handling industry can't afford. Only this Court is in a position to set a national standard regarding the imposition of liability against an individual. It is urged to use its discretion in granting Certiorari in order to do so.

II. Whether a single share of contribution liability can be assessed jointly and severally against three distinct parties which had differing connections to, and responsibilities toward, the activities at a landfill site pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9613(f)(1).

The District Court in its initial opinion found both MIG and AAA to be CERCLA "operators" at the MIG/Dewane Site. AAA, even though it was merely a transporter of waste to the site, was held to be an "operator" within the meaning of CERCLA due to certain financial entanglements between it and MIG. The second step in the court's analysis was to determine the percentage of responsibility to be assessed against the entire class of operators. Once the court made that allocation, it divided that percentage among the members of the operator class, including MIG and AAA. In doing so, the trial court felt that it was required to make separate allocations between MIG and AAA under section 9613(f)(1) of CERCLA. Accordingly, it divided MIG's operator-in-fact percentage equally between MIG and AAA, entering several judgments against each

company. Mr. Ter Maat was absolved of any liability at that stage of the proceedings.

The Seventh Circuit reversed. It held that the imposition of joint, rather than merely several, liability was an option which the trial court had not properly considered and remanded the case for further evaluation. A related question on remand was whether Mr. Ter Maat should be assessed a joint allocation of liability, or receive only some portion of it, if the trial court determined that he was an "operator." The District Court thereafter entered a joint judgment against all three entities for the "operator" assessment. The Seventh Circuit declined to address this issue when it was presented on a subsequent appeal.

In *Ter Maat*, the Seventh Circuit held that this issue was one of first impression:

> It is also clear we think that CERCLA does not preclude the imposition of joint as distinct from several liability in a suit for contribution. This is, or at least should be considered, a case of first impression at the appellate level. (*Ter Maat* at 956.)

However, that court recognized that this case was not the first appellate inquiry into the issue. In fact, the issue had been raised in three prior cases. One such case was *Carter-Jones Lumber Co. v. Dixie Distributing Co.*, 166 F.3d 840 (6th Cir. 1999) which held that joint liability could be assessed under Section 9613(f)(1). However, the Seventh Circuit determined that *Carter-Jones* had been improperly decided on state law grounds, and was therefore not precedent for resolving *Ter Maat*.

Two other decisions had previously held that joint liability could not be assessed under Section 9613(f)(1). They were *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998) and *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir., 1997). However, the Seventh Circuit dismissed these holdings as mere *dicta*.

It should be noted that the actions of each of the Petitioners in relation to the MIG/Dewane Landfill was substantially different. MIG possessed the permits to operate the site and, indeed, was the only entity that could legally do so in the State of Illinois. AAA, on the other hand, had no involvement in the day-to-day activities of the Site. It merely hauled trash to it. However, it had guaranteed loans to MIG and had otherwise become intertwined with MIG's finances. The trial court held that AAA had crossed the boundary of a mere "transporter" and had effectively become a "co-operator" because of that economic involvement. Mr. Ter Maat was shown to have devoted very little time to landfill issues, instead spending 98% of his time working on behalf of the hauling company, AAA.

Specific arguments on this issue can await the Appellants' brief should this Court grant Certiorari. For purposes of considering the issuance of a Writ, though, the Court should note that there are three significant justifications for doing so.

First, this Court should decide whether Section 9613(f)(1) contribution actions can result in joint liability under any circumstances. Joint liability is, after all, conceptually different than contribution. Contribution is traditionally limited to an analysis of one's actual share of culpability in relation to that of all other parties. Even if this

Court decides that the Seventh Circuit was correct, it should nevertheless address the issue of when the imposition of such joint liability would be proper. There was absolutely no discussion of the basis for imposing joint liability in this case at any level. That is, neither the trial court nor the intermediate court of appeal discussed the different relationship that each Petitioner had to the landfill. There was no discussion of the factors which might offer guidance to other trial courts facing this issue. There was no attempt to explain why Mr. Ter Maat, who was not even the corporation's primary officer at the landfill, was made responsible for the entire multi-million dollar judgment entered in the case. This lack of standards, even if joint liability can be justified, should be a major consideration in this Court's determination to issue a Writ of Certiorari.

Secondly, even though the Seventh Circuit claimed that this was an issue of first impression, the fact is that three intermediate courts of appeal, including a divided Sixth Circuit, have addressed it. At present, those four decisions are divided two against two. Only this Court has the authority to resolve this issue by stating a national standard.

A third reason relates to the basis of the Seventh Circuit's initial decision in this case. That is, the court of appeals held that the corporations were not a mere alter ego of Mr. Ter Maat, and thus refused to allow the trial court to consider veil piercing arguments on remand. In other words, Mr. Ter Maat's actions were clearly distinct from those of the corporations. Why, then, can he be viewed as synonymous with the corporations when liability is imposed? There is an obvious divergence in the court's reasoning as it relates to these closely interdependent issues.

III. Whether the appellate court properly invoked the *Law of the Case* doctrine in its refusal to consider the merits of the appeal from the District Court.-

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This case has had a somewhat tortuous procedural history which has effectively denied the Petitioners' any review of the factual determinations which were ultimately made by the trial court. The history of the case is as follows.

A contribution claim was filed in the District Court against these Petitioners which resulted in a lengthy trial. The District Court made several rulings of law in its opinion. Two of them are central to the current issue. The first of these determinations was that Richard Ter Maat was not a CERCLA "operator." The second was that Section 113(f)(1) of CERCLA, 42 U.S.C. §9613(f)(1), requires a several assessment of liability against each contribution defendant. *Browning-Ferris Industries of Illinois, Inc. et al. v. Ter Maat, et al.*, 13 F. Supp.2d 756 (N.D. Ill., WD 1998).

The case was appealed to the Seventh Circuit by the plaintiffs below (respondents here). That court affirmed most of the trial court's findings. However, it reversed as to the two previously-mentioned issues. *Browning-Ferris Industries of Illinois, Inc. et al. v. Ter Maat, et al.*, 195 F.3d 953 (7th Cir. 1999).

As to Mr. Ter Maat's personal liability, the Seventh Circuit held that there were two distinct bases for the imposition of CERCLA "operator" liability. The first would be through piercing the corporate veil consistent with state law. The trial court had held that there was not a sufficient

basis for doing so in this instance. The Seventh Circuit affirmed and prohibited the trial court from considering a veil piercing challenge on remand.

The appellate court held that a second basis for imposing personal liability would be directly through a finding that Mr. Ter Maat was an "operator" as defined by CERCLA. The appellate court held that this basis should have been considered by the trial court:

> Unfortunately, the district court did not consider this possibility, although urged to do so by the plaintiffs, and so a remand is necessary to determine Ter Maat's status. (*Ter Maat* at 956).

The Seventh Circuit also held that joint liability was an option under CERCLA's contribution section. This issue was likewise remanded for further consideration:

> The judge did not make such an allocation, mistakenly believing himself constrained to allocate liability equally among joint polluters, and so this is another issue requiring further consideration on remand. (*Ter Maat* at 957).

The appellate decision in *Ter Maat* discusses broad guidelines for the imposition of "operator" status on an individual, which were addressed in some detail in the first section of this Petition. That court, though, did not express similar guidelines for the manner in which the trial court was to consider the application of joint, rather than several, liability on remand.

The District Court refused to take new evidence on any of the issues raised by the Seventh Circuit's opinion. It considered the two remanded issues on the basis of the record before it. The District Court actually considered three issues, two of which were variations of the joint liability issue. That is, the trial court held that the "operator" share which had been assessed against MIG, but then allocated in equal shares to MIG and AAA on its first consideration, would now be entered jointly against MIG and AAA. A related issue would arise if the court also found Mr. Ter Maat to be an "operator," which it did. The trial court went on to hold that Mr. Ter Maat should also be held jointly liable for the entire MIG/AAA share, rather than merely for some portion of that liability which was representative of his conduct in relation to the site. *Browning-Ferris Industries of Illinois, Inc., et al. v. Ter Maat, et al.*, 2000 WL 1716330 (N.D. Ill., WD 2000).

These determinations resulted in a second appeal to the Seventh Circuit. However, that court summarily affirmed and dismissed the appeal in an order entered on May 30, 2001. *Browning-Ferris Industries of Illinois, Inc., et al. v. Ter Maat, et al.*, 2001 WL 599695 (7th Cir. 2001). The basis for the Seventh Circuit's affirmance was application of the *Law of the Case* Doctrine.

It is submitted that the *Law of the Case* Doctrine was not properly applied given the foregoing procedural background. The case wasn't reversed by the Seventh Circuit with directions to enter judgment against Mr. Ter Maat. Instead, it was returned to the District Court to consider a potential basis of liability which the Seventh Circuit felt had not been considered in the trial court's first decision. It was sent back for a *de novo* evaluation of the facts, and an application of the law to those facts. When the Seventh Circuit declined to review the subsequent appeal, Mr. Ter

Maat was left without any appellate review of the standards employed by the trial court in assessing over four million dollars of liability against him.

The same is true, only more so, in regard to the joint liability issue. The Seventh Circuit specifically called that issue one of "first impression at the appellate level." It held that joint liability was consistent with Section 9613(f)(1), but did not express any standards for the imposition of such liability, excepting only a general reference to the trial court's "equitable considerations." The possibility of imposing joint liability was certainly the law of the case in the District Court. However, the standards it used to address that issue were invoked for the first time on remand. Once again, the Petitioners were deprived of any appellate review of the trial court's actions when the intermediate court of appeals refused to address the issue. One thing is clear, though. The *Law of the Case* Doctrine is not an impediment to this Court's determination of whether the Seventh Circuit has properly interpreted CERCLA. *Messinger v. Anderson*, 225 U.S. 436 (1912).

If this Court declines to use its discretion in issuing a Writ of Certiorari, the end result will be that AAA will find itself jointly liable for the landfill activities of another corporation. Even more egregious, Mr. Ter Maat will have had a judgment in excess of four million dollars entered against him without any appellate review of the appropriateness of the trial court's reasoning. A judgment of that magnitude, without adequate appellate review, is in derogation of all concepts of fundamental fairness and due process.

CONCLUSION

There are important issues of statutory interpretation that are presented in this Petition for Writ of Certiorari. The law is currently inconsistent, and conflicting, regarding the "operator" liability of individuals under CERCLA. It requires the oversight of this Court to establish a truly national standard.

The imposition of joint liability in a CERCLA contribution action was termed an issue of first impression by the Seventh Circuit. Even a casual reading of the cases on this issue, though, would suggest that three circuits have issued four opinions which take positions on that issue, and that they are evenly divided. Again, this is a major area of statutory interpretation which only this Court can resolve.

This Court also needs to give serious consideration to the due process implications of denying certiorari in this case. A citizen of this nation is under the oppressive burden of a four million dollar judgment that was rendered against him without any articulation of the basis for it, and no appellate review of it.

For the reasons stated, this Court is respectfully requested to invoke its discretionary jurisdiction and grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Submitted April 19, 2001]
[Decided may 30, 2001]

No. 00-4188

BROWNING-FERRIS INDUSTRIES OF ILLINOIS, INCORPORATED, APACHE PRODUCTS COMPANY, TAMMS INDUSTRIES, et al., *Plaintiffs-Appellants,*	)
v.	)
RICHARD TER MAAT, INCORPORATED, AAA DISPOSAL SYSTEMS, INCORPORATED, and MIG INVESTMENTS, INCORPORATED *Defendants-Appellees.*	)

Appeal from the United States District Court for the Northern District of Illinois, Western Division
No. 92- C 20259

Philip G. Reinhard, Judge.

ORDER[1]

PER CURIAM. This is a sequel to *Browning-Ferris Industries of Illinois, Inc. v. Ter Maat*, 195 F.3d 953 (7th Cir. 1999), and familiarity with that opinion is assumed. *Browning-Ferris* sued Richard Ter Maat and two corporations controlled by him, M.I.G. and AAA, seeking contribution under the Superfund statute for the costs it had incurred in cleaning up a contaminated landfill. The district court allocated some of those costs to the two corporate defendants. The plaintiff, *Browning-Ferris*, appealed. We affirmed in part, but remanded for a redetermination of Ter Maat's personal liability and a determination of whether any liable defendants should be jointly liable, meaning that each one would be fully liable for the judgment; this was important because M.I.G. is assetless.

On remand, the district court, applying the standard we had laid down for determining personal liability in a Superfund case, found that Mr. Ter Maat was indeed personally liable, having supervised the day to day operations of the landfill including the dumping of wastes, the source of the contamination that required the clean up by *Browning-Ferris*. He further found that, since all three defendants had participated in the operations of the landfill, all three were indeed jointly liable.

The defendants have appealed, arguing primarily that the standard we laid down in our previous opinion for

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[1] As a result of circumstances that arose after the court's decision in the earlier appeal, *Browning-Ferris Industries v. Ter Maat*, 195 F.3d 953 (7th Cir. 1999), Judge Ripple has not participated in the decision of this appeal.

determining whether an individual is personally liable under the Superfund statute for pollution by his corporation is erroneous. In so arguing, however, the defendants fail to reckon with the law of the case doctrine, which in the absence of special circumstances not shown here required the district court and requires us to follow the rules of law laid down by us in a previous stage of the lawsuit. This aside, as convincingly shown in the district court's opinion on remand, the evidence of Mr. Ter Maat's personal operation of the landfill, including the dumping operations that produced the contamination, is overwhelming. The same is true with regard to the evidence that all three defendants were directly involved in the operation of the landfill and so are jointly liable for the portion of the clean-up costs that the district court has allocated to the defendants rather than to the plaintiff.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Filed November 1, 1999]

Nos. 98-3204 and 99-1360

BROWNING-FERRIS INDUSTRIES OF ILLINOIS, INC., et al., *Plaintiffs-Appellants,*	)
v.	)
RICHARD TER MAAT, et al., *Defendants-Appellees.*	)

Appeals from the United States District Court
for the Northern District of Illinois, Western Division.
No. 92 C 20259--Philip G. Reinhard, *Judge.*

ARGUED SEPTEMBER 8, 1999
DECIDED NOVEMBER 1, 1999

Before POSNER, *Chief Judge,* and BAUER and RIPPLE, Circuit Judge.

POSNER, *Chief Judge.* Browning-Ferris and several other companies have brought a suit for contribution under the

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA–the Superfund statute). The suit is against Richard Ter Maat and two corporations of which he is (or was – one of the corporations has been sold) the president and principal shareholder; they are M.I.G. Investments, Inc. and AAA Disposal Systems, Inc.

Back in 1971 the owners of a landfill had leased it to a predecessor of Browning-Ferris, which operated it until the fall of 1975. Between then and 1988 it was operated by M.I.G. and AAA. In June of that year, after AAA was sold and Ter Maat moved to Florida, M.I.G. abandoned the landfill without covering it properly. For tax reasons, M.I.G. had been operated with very little capital, and it lacked funds for a proper cover. Two years after the abandonment, the EPA placed the site on the National Priorities List, the list of the toxic waste sites that the Superfund statute requires be cleaned up, see 42 U.S.C. §§ 9605(8)(B), 9616(d), (e), and shortly afterward Browning-Ferris and the other plaintiffs, which shared responsibility for some of the pollution at the site, agreed to clean it up.

Section 113(f)(1) of the Superfund law authorizes any person who incurs costs in cleaning up a toxic-waste site to "seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). Section 107(a)(1), 42 U.S.C. § 9607(a)(1), a part of the statutory provision to which section 113(f)(1) refers, includes in the set of potentially liable persons anyone who owned or operated a landfill when a hazardous substance was deposited

in it, and this set is conceded to include both M.I.G. and AAA. The district judge held, however, that Ter Maat was not himself a potentially liable person, because he had done nothing that would subject him to liability on a "piercing the corporate veil" theory for the actions of the two corporations. So far as corporate liability for clean-up costs was concerned, the judge ruled that of the 55 percent of those costs that he deemed allocable to transporters and operators (the other 45 percent he allocated to the owners of the landfill and the generators of the toxic wastes dumped in it), 40 percent was the responsibility of Browning-Ferris and the other 60 percent the responsibility of M.I.G. and AAA. As between those two, the judge allocated responsibility equally, holding that, although the two corporations had operated the landfill jointly, the statute required him to allocate liability severally rather than jointly.

Browning-Ferris and the other companies that have incurred clean-up costs at the site of the former landfill have appealed. All of them join in making the following three arguments: the corporate veil should be pierced two ways, one to make Richard Ter Maat liable for the conduct of both "his" corporations, AAA and M.I.G., and the other to make AAA liable for M.I.G.'s conduct as an affiliate; in any event Ter Maat is directly as distinct from derivatively liable for contribution, as he was personally an operator of the landfill; the Superfund statute does permit joint liability in a contribution suit and it would be equitable to make AAA pay for the whole amount allocated to the two corporations, since they were jointly liable and M.I.G. is assetless (or may be – it has some insurance). Finally, Browning-Ferris argues that the district court allocated too much of the liability for the pollution at the site to it relative to M.I.G. and AAA.

Two issues are relatively simple and we address them first. One is whether an individual can shield himself from liability for operating a hazardous-waste facility merely by being an officer or shareholder of a corporation that also operates the facility. The answer is no. The principle of limited liability shields a shareholder from liability for the debts (including debts arising from tortious conduct) of the corporation in which he owns shares (with the exception discussed later for "veil piercing" situations), but not for his personal debts, including debts arising from torts that he commits himself. In other words, the status of being a shareholder does not immunize a person for liability for his, as distinct from the corporation's, acts. E.g., *Sidney S. Arst Co. v. Pipefitters Welfare Education Fund,* 25 F.3d 417, 420 (7th Cir. 1994); *Spartech Corp. v. Opper,* 890 F.2d 949, 953 (7th Cir. 1989); *Redwing Carriers, Inc. v. Saraland Apartments,* 94 F.3d 1489, 1503 (11th Cir. 1996); *Aronson v. Price,* 644 N.E.2d 864, 867 (Ind. 1994). There is no liability shield at all for an officer. If he commits an act that is outside the scope of his official duties, his employer may not be liable; but he is whether or not the act was within that scope. E.g., *Itofca, Inc. v. Hellhake,* 8 F.3d 1202, 1204 (7th Cir. 1993); *Carter-Jones Lumber Co. v. Dixie Distributing Co.,* 166 F.3d 840, 846-47 (6th Cir. 1999); *United States v. Northeastern Pharmaceutical & Chemical Co.,* 810 F.2d 726, 744 (8th Cir. 1986). Which is not to say, however, that the officer is automatically liable for the acts of the corporation; there is no doctrine of "superiors' liability," comparable to the doctrine of respondeat superior, that is, the employer's strict liability for torts of the employee committed within the scope of his employment.

So if Ter Maat operated the landfill personally, rather

than merely directing the business of the corporations of which he was the president and which either formally, or jointly with him (as well as with each other), operated it, he is personally liable. E.g., *United States v. Bestfoods,* 524 U.S. 51, 55 (1998); *Sidney S. Arst Co. v. Pipefitters Welfare Education Fund, supra,* 25 F.3d at 421-22; *Riverside Market Development Corp. v. International Bldg. Products, Inc.,* 931 F.2d 327, 330 (5th Cir. 1991) (per curiam). The line between a personal act and an act that is purely an act of the corporation (or of some other employee) and so not imputed to the president or to other corporate officers is sometimes a fine one, but often it is clear on which side of the line a particular act falls. If an individual is hit by a negligently operated train, the railroad is liable in tort to him but the president of the railroad is not. Or rather, not usually; had the president been driving the train when it hit the plaintiff, or had been sitting beside the driver and ordered him to exceed the speed limit, he would be jointly liable with the railroad. If Ter Maat did not merely direct the general operations of M.I.G. and AAA, as in *id.* at 330, or specific operations unrelated to pollution, *United States v. Bestfoods, supra,* 524 U.S. at 66-67; *United States v. Township of Brighton,* 153 F.3d 307, 313-15 (6th Cir. 1998), but supervised the day-to-day operations of the landfill – for example, negotiating waste-dumping contracts with the owners of the wastes or directing where the wastes were to be dumped or designing or directing measures for preventing toxic substances in the wastes from leeching into the ground and thence into the groundwater – then he would be deemed the operator, jointly with his companies, of the site itself. E.g., *Control Data Corp. v. S.C.S.C. Corp.,* 53 F.3d 930, 937 (8th Cir. 1995); *Witco Corp. v. Beekhuis,* 38 F.3d 682, 692 (3d Cir. 1994); *FMC Corp. v. Aero Industries, Inc.,* 998 F.2d 842, 846 (10th

Cir. 1993); *United States v. Northeastern Pharmaceutical & Chemical Co., supra,* 810 F.2d at 743. Unfortunately the district court did not consider this possibility, although urged to do so by the plaintiffs, and so a remand is necessary to determine Ter Maat's status.

It is also clear we think that CERCLA does not preclude the imposition of joint as distinct from several liability in a suit for contribution. This is, or at least should be considered, a case of first impression at the appellate level. *Carter-Jones Lumber Co. v. Dixie Distributing Co., supra,* 166 F.3d at 847-48, does hold that CERCLA permits joint liability in a contribution suit, but on the unsatisfactory ground that state law so required, when it is plain that actions for CERCLA contribution are governed by federal law. Section 113(f), 42 U.S.C. § 9613(f)(1), the CERCLA contribution provision, provides expressly that actions under it are to be governed by federal law, with the federal court to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." There is a savings provision in CERCLA, 42 U.S.C. § 9652(d), but the plaintiffs' claims in this case are based exclusively on the federal contribution provision, and not on state law.

An earlier Sixth Circuit case had tossed off a casual dictum that contribution liability under CERCLA is several, not joint, *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.,* 153 F.3d 344, 348 (6th Cir. 1998), but the dictum is defunct after *Carter-Jones.* A similar dictum in *Pinal Creek Group v. Newmont Mining Corp.,* 118 F.3d 1298, 1303 (9th Cir. 1997), is, when read in context, limited to cases in which potentially responsible parties are suing under a provision of

CERCLA, § 107(a), 42 U.S.C. § 9607(a), that imposes *automatic* joint liability on defendants; the cases hold that the parties' rights are nevertheless subject to allocation under section 113(f), which does not include that automatic feature. See *id.* at 1306; *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994); *Centerior Service Co. v. Acme Scrap Iron & Metal Corp., supra,* 153 F.3d at 349-53. Joint liability thus is optional, rather than unavailable.

In traditional common law, when two or more persons inflict an indivisible injury each is fully liable for the injury. That is, the plaintiff can if he wants sue one of the tortfeasors for the entire damages and let the other go, and the one who is sued has no remedy against the one who got off scot-free. CERCLA modifies the traditional common law rule (as many other statutes do and as many state courts have done by modifying the common law) by allowing one liable party to sue another for contribution. It does not follow that if, as in this case, contribution is sought from more than one party, the defendants cannot be held jointly liable. It is up to the district judge, guided only by equitable considerations – a broad and loose standard, see *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 326 (7th Cir. 1994); *Environmental Transportation Systems, Inc. v. ENSCO, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992); *United States v. Colorado & Eastern R.R.*, 50 F.3d 1530, 1536 (10th Cir. 1995) – to decide, and it is easy to imagine cases, of which this may be one, where such considerations weigh heavily in favor of joint liability.

Suppose, to alter the facts for simplicity's sake, that Browning-Ferris had been made to clean up the entire site even though it had made only a small (say, 1 percent)

contribution to its toxicity. Suppose M.I.G. and AAA were the bad actors jointly responsible for the other 99 percent. Suppose that for tax or other reasons M.I.G. had no assets. Under the view of the district court, even though M.I.G. and AAA had combined to inflict an indivisible injury (the contamination for which they were jointly responsible as joint operators), AAA would have to pay only 50 percent of the contamination for which it and M.I.G. were jointly liable, or 49.5 percent of the total clean-up cost (remember that we're assuming that the two corporations are jointly responsible for 99 percent of the total contamination), while Browning-Ferris would have to pay 50.5 percent of the total clean-up cost even though it was responsible for only 1 percent of that cost. Cf. *Carter-Jones Lumber Co. v Dixie Distributing Co., supra.* These are not our facts, but they show that a rule against ever holding contribution defendants jointly liable would be inconsistent with the statutory direction that the district court allocate liability equitably among the liable parties. Cf. *Centerior Service Co. v. Acme Scrap Iron & Metal Corp., supra,* 153 F.3d at 354 n. 12; *Sun Co. v. Browning-Ferris, Inc.,* 124 F.3d 1187, 1193 (10th Cir. 1997); *Pinal Creek Group v. Newmont Mining Corp., supra,* 118 F.3d at 1303. The judge did not make such an allocation, mistakenly believing himself constrained to allocate liability equally among joint polluters, and so this is another issue requiring further consideration on remand.

The next issue is whether the district judge allocated too large a share (40 percent) of responsibility for the cost of the clean up to Browning-Ferris relative to the defendants, who had operated the landfill for a lot longer time and had dumped a much larger quantity of wastes in it. The judge allocated as large a share as he did to Browning-Ferris

because he found that it had operated the landfill poorly and had dumped particularly toxic wastes from a nearby Chrysler plant in violation of its operating permit, and the liquid character of the wastes had hastened their absorption into groundwater. Browning-Ferris argues both that these findings are erroneous and that, in any event, there is no evidence that the wastes from the Chrysler plant increased the cost of cleaning up the site and anyway the amount dumped in the landfill was not as great as the district judge found. From evidence that a considerable portion of the Chrysler wastes were dumped elsewhere, Browning-Ferris argues that defendants' expert had exaggerated the amount deposited in the landfill. Browning-Ferris may be correct on all these factual points, but we cannot say that the district court committed any *clear* errors in finding as it did, and that of course is our criterion.

The trickier question, which returns us to the issue of the district court's equitable discretion in allocating liability among polluters, is whether the court must find a causal relation between a party's pollution and the actual cost of cleaning up the site. To answer this question we have to distinguish between a necessary condition (or "but-for cause") and a sufficient condition. If event A is a necessary condition of event B, this means that, without A, B will not occur. If A is a sufficient condition of B, this means that, if A occurs, B will occur. If A is that the murder weapon was loaded and B is the murder, then A is a necessary condition. If A is shooting a person through the heart and B is the death of the shooting victim, then A is a sufficient condition of B but not a necessary condition, because a wound to another part of the victim's body might have been fatal as well.

This distinction may sometimes be important in the pollution context. It is easy to imagine a case in which, had X not polluted a site, no clean-up costs would have been incurred; X's pollution would be a necessary condition of those costs and it would be natural to think that he should pay at least a part of them. But suppose that even if X had not polluted the site, it would have to be cleaned up — and at the same cost – because of the amount of pollution by Y. (That would be a case, perhaps rare, in which the clean-up costs were sensitive neither to the amount of pollution nor to any synergistic interaction between the different pollutants.) Then X's pollution would not be a necessary condition of the clean up, or of any of the costs incurred in the clean up. But that should not necessarily let X off the hook. For suppose that if X had not polluted the site at all, there still would have been enough pollution from Y to require a clean up, but that if Y had not polluted the site X's pollution would have been sufficient to require the clean up. In that case, the conduct of X and the conduct of Y would each be a sufficient but not a necessary condition of the clean up, and it would be entirely arbitrary to let either (or, even worse, both) off the hook on this basis. So far as appears, this is such a case; Browning-Ferris's pollution was serious enough (if indeed it dumped a large quantity of Chrysler's particularly toxic wastes) to require that the site be cleaned up, but the other pollution at the site was also enough. If Browning-Ferris's conduct was thus a sufficient though not a necessary condition of the clean up, it is not inequitable to make it contribute substantially to the cost.

We do not suggest that this is one of the presumably rare cases in which the total costs of clean up are unaffected by the number of polluters or the specific amounts or types of

pollution contributed by each. Browning-Ferris's pollution was not, so far as appears, so serious all by itself as to have required the incurring of *all* the cleanup costs that were incurred. Even so, no principle of law, logic, or common sense required the court to allocate those total costs among the polluters on the basis of the volume of wastes alone. Not only do wastes differ in their toxicity, harm to the environment, and costs of cleaning up, and so relative volume is not a reliable guide to the marginal costs imposed by each polluter; but polluters differ in the blameworthiness of the decisions or omissions that led to the pollution, and blameworthiness is relevant to an equitable allocation of joint costs. (Presumably it would not entitle the judge to make one polluter pay for separable costs wholly imposed by other polluters.) The district judge did not abuse his discretion in deciding that all these factors warranted making Browning-Ferris bear more than its proportional volumetric share of the pollution.

It remains to consider two issues of derivative liability. If Ter Maat is deemed on remand to be personally liable as an operator of the landfill, and especially if the judge allocates 100 percent of the joint liability of M.I.G. and AAA to AAA, the solvent one of the pair (there is no suggestion that the change of ownership gets AAA off the liability hook), then Browning-Ferris and the other plaintiffs will be able to collect the amount of contribution to which they are entitled from the defendants. But these are big "ifs" (how big is for the district judge to decide, in the first instance, on remand). The judge may find that Ter Maat was not an operator and that AAA should not bear the entirety of its joint liability with M.I.G. In that event, it will become important whether Ter Maat and AAA are derivatively liable for the conduct of M.I.G., and as the issue is fully briefed we shall resolve it now and hope to

head off a further appeal.

The argument is that the corporate veil should be pierced, and Ter Maat, as shareholder of M.I.G. and AAA, and AAA as an affiliate of M.I.G. (both dominated by Ter Maat, and AAA in addition a 30 percent shareholder of M.I.G.), should be held liable for M.I.G.'s debt to the plaintiffs. Although there is a split of authority on whether federal or state law governs the piercing of the corporate veil in CERCLA cases (the Supreme Court expressly left the question open in *United States v. Bestfoods, supra,* 524 U.S. at 63 n. 9), that is not a problem here because the parties have assumed that state law (Illinois state law, specifically) governs and so any contention that federal law should instead govern has been waived. *Lloyd v. Loeffler,* 694 F.2d 489, 495 (7th Cir. 1982).

The general rule, of course, in Illinois as elsewhere, is that a shareholder qua shareholder, and a parent, subsidiary, or other affiliate, qua affiliate, is not liable for a corporation's debts. E.g., *In re Rehabilitation of Centaur Ins. Co.*, 632 N.E.2d 1015, 1017 (Ill. 1994); *Itofca, Inc. v. Hellhake, supra,* 8 F.3d at 1204 (applying Illinois law). That is the principle of limited liability and it serves the important social purpose of encouraging investment by individuals who are risk averse and therefore will not invest (or will insist on a much higher return) in an enterprise if by doing so they expose their entire wealth to the hazards of litigation. But in some circumstances the corporate veil is pierced and the corporation's debtor allowed to collect his debt from the shareholder or affiliate.

In the case of a voluntary creditor, for example

someone who had lent money to the corporation, the strongest case for piercing the veil is presented when the corporation had led potential creditors to believe that it was more solvent than it really was. *Holland v. Joy Candy Mfg. Corp.*, 145 N.E.2d 101 (Ill. App. 1957); *In re Xonics Photochemical, Inc.*, 841 F.2d 198, 201 (7th Cir. 1988); *In re Kaiser*, 791 F.2d 73, 75 (7th Cir. 1986). For example, the nonbank subsidiary of a bank holding company might hold itself out as being the bank, leading creditors to believe that they were dealing with a more substantial corporation than was in fact the case; that would be a good case for piercing the veil. *FMC Finance Corp. v. Murphree*, 632 F.2d 413, 423 (5th Cir. 1980); cf. *Fentress v. Triple Mining, Inc.*, 635 N.E.2d 102, 108 (Ill. App. 1994); *Hystro Products, Inc. v. MNP Corp.*, 18 F.3d 1384, 1390-91 (7th Cir. 1994) (Illinois law). Although Illinois formulates the test for piercing the veil in more traditional terms - with much talk of "unity of interest and ownership," "commingling of assets," disappearance of the separate "personalities" of the corporation and its owner or affiliate, and the desirability of avoiding "injustice," e.g., *id.* at 1388-91- it is hard to see how a voluntary creditor can complain if he knows that his debtor lacks sufficient assets to be certain to be able to pay the debt when it comes due.

Analysis is more difficult in the case of an involuntary creditor, such as the plaintiffs here, who wish to be compensated for having in effect "lent" the money to clean up the site of the former landfill but lent under compulsion, having been forced to clean it up by the Superfund law rather than pursuant to a contract with the "debtors," such as M.I.G. See generally *Secon Service System, Inc. v. St. Joseph Bank & Trust Co.*, 855 F.2d 406, 413-14 (7th Cir. 1988). In such a case there is no issue of protecting reliance induced by

misrepresentations by the debtor. The plaintiffs in dumping toxic wastes to the landfill obviously were not relying on M.I.G.'s appearing to have greater assets than it actually had. In these circumstances we can think of only two arguments for piercing the corporate veil. The first is that the owners may have so far neglected the legal requirements (requirements not intended solely for the protection of creditors) for operating in the corporate form that they should be taken to have forfeited its protections, forfeiture thus operating to enforce the legal requirements that the state has seen fit to impose on investors who want the benefits of limited liability. Moreover, if the formalities have been flouted, it becomes hard to see how the investors could reasonably have relied on the protections of limited liability; they would have known they were skating on thin ice. In such a case the investment-encouraging function of limited liability is attenuated.

Second, it could be argued that enterprises engaged in potentially hazardous activities should be prevented from externalizing the costs of those activities, by being required to maintain or at least endeavor to maintain a sufficient capital cushion to be answerable in a tort suit should its activities cause harm for which liability would attach, on pain of its shareholders' and affiliates' losing their limited liability should the corporation fail to do this. This argument has not carried the day in any jurisdiction that we are aware of, presumably because of the risks that it would impose on shareholders and because the potential victims of the corporation's hazardous activities can be protected without making inroads into limited liability by requiring enterprises engaged in such activities to post a bond large enough to assure that any judgment against the corporation will be collectible. Courts do, it is true, frequently mention

"undercapitalization" as a separate ground from neglect of corporate formalities for piercing the corporate veil. *Hystro Products, Inc. v. MNP Corp., supra,* 18 F.3d at 1389-91; *Sea-Land Services, Inc. v. Pepper Source,* 941 F.2d 519, 522 (7th Cir. 1991); *People v. V & M Industries, Inc.,* 700 N.E.2d 746, 751 (Ill. App. 1998); *Jacobson v. Buffalo Rock Shooters Supply Inc.,* 664 N.E.2d 328, 332 (Ill. App. 1996); *Fentress v. Triple Mining, Inc., supra,* 635 N.E.2d at 107; *McCracken v. Olson Cos.,* 500 N.E.2d 487, 492 (Ill. App. 1986). They do not do so on the basis of unusual risks to potential tort victims or other involuntary creditors, however, though conceivably such concerns are in the background of their thinking.

There is no evidence that either M.I.G. or AAA failed to comply with the legal requirements for operating in the corporate form, except with regard to keeping minutes of their corporate meetings - not a failure significant enough to warrant forfeiture of limited liability, given that penalties should be proportioned to the gravity of the misconduct being penalized. The plaintiffs further argue, however, that M.I.G. was undercapitalized. The clearest case -- here merging, though, with neglect of corporate formalities - for forfeiture of limited liability on this ground is where the corporation has failed to maintain the minimum capitalization required by law. But such cases are few (the only Illinois case we can find is *Gallagher v. Reconco Builders, Inc.,* 415 N.E.2d 560, 564 (Ill. App. 1980)), and do not bear on the "pierceability" of the corporate veil of M.I.G., which is not accused of ever having maintained a lower capitalization than the law required. The fact that its motivation in operating with little capital was to reduce taxes does not argue for piercing the corporate veil, since taking advantage of lawful opportunities

for avoiding taxes is not wrongful activity.

There is of course a difference between assets available to pay a judgment and taxable income; the former might be ample while the latter was slight. But our point is only that the fact that M.I.G. might have been "under-capitalized" for tax reasons is not a reason for piercing the corporate veil. The cases in which undercapitalization has figured in the decision to pierce the corporate veil are ones in which the corporation had so little money that it could not and did not actually operate its nominal business on its own. An example is the corporation in the *Fentress* case, which had no capital at all that the court could find, and no bank account. Even there the court did not pierce the veil on the basis of undercapitalization alone, but cited also a persistent neglect of corporate formalities. Undercapitalization is rarely if ever the sole factor in a decision to pierce the corporate veil, William P. Hackney & Tracey G. Benson, "Shareholder Liability for Inadequate Capital," 43 *U. Pitt. L. Rev.* 837, 885-87 (1982), and we think is best regarded simply as a factor helpful in identifying a corporation as a pure shell, which M.I.G. was not.

So on remand, to summarize, there will be no issues of veil piercing to consider but the court will have to decide Ter Maat's personal liability and whether AAA should pay more than 50 percent of the two corporations' liability to the plaintiffs.

AFFIRMED IN PART,
REVERSED IN PART, AND REMANDED.

A true Copy:

Teste:

/s/_____
Clerk of the United States Court
of Appeals for the Seventh Circuit

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Dated November 1, 1999]

Nos. 98-3204 and 99-1360

BROWNING-FERRIS INDUSTRIES OF ILLINOIS, INCORPORATED, APACHE PRODUCTS COMPANY, TAMMS INDUSTRIES, et al., *Plaintiffs-Appellants,*	)
v.	)
RICHARD TER MAAT, MIG INVESTMENTS, INCORPORATED, AAA DISPOSAL SYSTEMS, INCORPORATED, et al., *Defendants-Appellees.*	)

JUDGMENT - WITH ORAL ARGUMENT

BEFORE:

Honorable RICHARD A. POSNER, Chief Judge
Honorable WILLIAM J. BAUER, Circuit Judge

Honorable KENNETH F. RIPPLE, Circuit Judge

Appeals from the United States District Court for the
Northern District of Illinois, Western Division
No. 92 C 20259, Philip G. Reinhard, Judge

The judgment of the District Court is **AFFIRMED** in part, **REVERSED** in part, and this cause is **REMANDED**, in accordance with the decision of this court entered on this date. No costs shall be awarded.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

[Date November 8, 2000]

No. 92 C 20259

BROWNING-FERRIS INDUSTRIES OF ILLINOIS, INCORPORATED, et al.,	)
v.	)
RICHARD TER MAAT, et al.,	)

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that defendants' motion to supplement evidence and their motion for reapportionment of judgment are denied. For the reasons stated in the attached Memorandum Opinion and Order, judgment is entered for plaintiffs and against MIG, AAA and Ter Maat, jointly, for $4,136,685.38 in site costs through December31, 1997, and for 85% of all IRM costs and

27.14% of all other site costs incurred after December 31, 1997, which are consistent with the NCP. Judgment is further entered for plaintiffs and against AAA for an additional $313,552.26 in site costs incurred through December 31, 1997, and for an additional 4.7% of all non-IRM costs incurred after December 31, 1997, which are consistent with the NCP. Defendants' request for oral argument is denied.

Michael W. Dobbins
Clerk of Court

/s/_____
Susan Wessman
Deputy Clerk

Date: 11/8/2000

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

[Date November 8, 2000]

No. 92 C 20259

BROWNING-FERRIS INDUSTRIES OF ILLINOIS, INCORPORATED, et al.,	)
v.	)
RICHARD TER MAAT, et al.,	)

Defendants' motion to supplement evidence and their motion for reapportionment of judgment are denied. For the reasons stated in the attached Memorandum Opinion and Order, judgment is entered for plaintiffs and against MIG, AAA and Ter Maat, jointly, for $4,136,685.38 in site costs through December 31, 1997, and for 85% of all IRM costs and 27.14% of all other site costs incurred after December 31, 1997, which are consistent with the NCP. Judgment is further entered for plaintiffs and against AAA for an additional $313,552.26 in site costs incurred through December 31, 1997, and for an additional 4.74% of all non-IRM costs incurred after December 31, 1997, which are consistent with the NCP. Defendants' request for oral

argument is denied

[For further detail see order attached to the original minute order.]

/s/_____

APPENDIX F

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

No. 92 C 20259

[November 8, 2000]

BROWNING-FERRIS INDUSTRIES OF ILLINOIS, INC., et al.	)
Plaintiffs,	)
v.	)
RICHARD TER MAAT, et al.,	)
Defendants.	)

MEMORANDUM OPINION AND ORDER

Introduction

Following a two-week bench trial, this court issued its decision regarding plaintiffs' action for contribution and declaratory relief pursuant to the Comprehensive Environmental Response, Compensation and Liability Act

("CERCLA"), as amended, 42 U.S.C. § 9607, 9613, and under the Declaratory Judgment Act, 28 U.S.C. § 2201, 2202, in *Browninq-Ferris Indus. v. Ter Maat*, 13 F.Supp.2d 756 (N.D. Ill. 1998) (Reinhard, J.). On appeal, the Seventh Circuit Court of Appeals affirmed in part, reversed in part and remanded. *See Browning-Ferris Indus. v. Ter Maat*, 195 F.3d 953 (7th Cir. 1999), *cert. denied*, 120 S.Ct. 1832 (2000).[2]

On remand, there are three specific issues facing this court: (1) whether Richard Ter Maat ("Ter Maat") is personally liable under CERCLA as an operator; (2) whether M.I.G. Investments, Inc. ("MIG") and AAA Disposal Systems, Inc. ("AAA") are jointly liable for the operator shares allocated to them by this court in its previous decision; and (3) whether Ter Maat, should he be found individually liable as a CERCLA operator, is jointly liable with MIG and AAA for the operator share allocable to all three parties. The court will separately address each issue.

Analysis

A. Whether Ter Maat is Personally Liable

The court finds Ter Maat is personally liable under CERCLA as an operator. The Seventh Circuit stated in its

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[2] For a complete recitation of the facts, *see Browning-Ferris Indus. v. Ter Maat*, 13 F.Supp.2d 756 (N.D. Ill. 1998) and *Browning-Ferris Indus. v. Ter Maat*, 195 F.3d 953 (7th Cir. 1999). In this opinion, the court will include only those facts necessary to decide the issues currently before it.

opinion that, if Ter Maat operated the landfill personally, he is personally liable. *Ter Maat*, 195 F.3d at 956. The line between a personal act and an act that is purely an act of the corporation is a fine one. *Id.* However, the Seventh Circuit gave clear guidelines in drawing this line:

> If Ter Maat did not merely direct the general operations of MIG and AAA, or specific operations unrelated to pollution, but supervised the day-to-day operations of the landfill -- for example, negotiating waste-dumping contracts with the owners of the wastes or directing where the wastes were to be dumped or designing or directing measures for preventing toxic substances in the wastes from leeching into the ground and thence into the groundwater -- then he would be deemed the operator, jointly with his companies, of the site itself. *Id.* (citations omitted)

This court had specifically found in its earlier opinion, "the evidence shows that Richard Ter Maat, as an officer and director of AAA and MIG, was involved in the operational decision-making at the site." *Ter Maat*, 13 F.Supp.2d at 764. The evidence overwhelmingly shows Ter Maat engaged in the types of activities the Seventh Circuit specifically listed as conduct showing he crossed the line from merely acting on behalf of the corporation to personally acting as an operator. For example, Ter Maat personally negotiated almost every (if not every) contract between MIG and the waste haulers that used the site while MIG was leasing it, including setting the pricing. (R.501-02, 537, 2027, 2036) Although others participated in the negotiations, none of the contracts would

have been signed without Ter Maat's approval. (R. 502) He also negotiated nearly all waste hauling contracts for AAA, and negotiated the site leases with the owners of the property. (R. 53, 65, 592-93) Ter Maat personally participated in negotiations with the city of Belvidere, Boone County, and the State of Illinois regarding permit requirements, expansion initiatives, efforts to address site environmental issues in the late 1980s, and efforts to keep the site open after June 1988. (R. 593, 1963-65, 1975-77)

He was also a key figure in the set up of site operations. For example, he developed, arranged for the proper permits, and constructed AAA's transfer station, where semi-truck loads of waste were hauled to the site when the site was accepting waste. (R. 1913-17, 2005) Ter Maat was also directly involved in pollution control measures. For example, he personally involved himself with accepting and rejecting loads from the waste haulers. (R. 537, 1934-38, 2040-41) He personally handled the special waste disposal process: he personally saw or inspected (or at least tried to) every waste stream that was permitted as special waste and took waste samples from each special waste generator, arranged for the testing with the laboratories to analyze each special waste sample, applied to IEPA for each special waste permit, signed each IEPA special waste application as the owner and operator of the site, and negotiated with IEPA over the special waste approval process for each special waste. (R. 487-88, 591-92, 1929-32, 2008-09) In signing the IE?A special waste permit applications, Ter Maat held himself out to IEPA as the site operator whenever such a question arose. (R. 1924-25) He was the point man for dealing with IEPA, insisting that he be present during any IEPA inspection. (R. 479, 593, 1926-29, 2095-96) He was also personally involved

in dealing with methane gas management, site expansion, access road management, and implementing a bioremediation program to address a problem involving volatile organic compounds ("VOC"). (R. 1881, 1949-50, 1961-62, 1976, 2058-59) There are several letters from AAA's environmental consultant, M. Rapps Associates Inc., addressed to Ter Maat and AAA which address pollution and cleanup at the site. *Ter Maat*, 13 F.Supp.2d at 765.

Ter Maat was also the contact person at AAA and MIG for all legal matters relating to the site. (R. 2010-11) He personally sent several letters to the IEPA. *Ter Maat*, 13 F.Supp.2d at 764. He also sent a letter to the Illinois Division of Land Noise Pollution Control pertaining to an operating permit for the site which was also signed by him. *Id.* at 764-65. In fact, every piece of correspondence on MIG letterhead which was listed as a trial exhibit was signed by Ter Maat.

In short, Ter Maat was an operator of the landfill on a daily basis. Ter Maat's major ownership in and as the dominant officer of AAA and MIG in the actual operations of AAA and MIG went far beyond just directing the general operations of both corporations. He himself candidly stated this, long before this litigation. In a letter to the IE?A in 1979, Ter Maat unequivocally stated, "I -- not my operator directs the operators at the site and am responsible for the day to day operations." (P277)

B. <u>Whether MIG and AAA Are Jointly Liable</u>

In *Ter Maat*, 195 F.3d at 956-57, the Seventh Circuit held CERCLA does not preclude the imposition of joint liability in a suit for contribution. As the Seventh Circuit

stated, it is up to this court, guided only by equitable considerations -- a broad and loose standard -- to decide whether such considerations weigh in favor of joint liability. This court finds MIG and AAA are jointly liable for the operator shares this court previously allocated to them.

In deciding whether to impose joint liability, CERCLA does not limit the court to any particular list of factors or limit the court to any particular test in exercising its equitable powers. Here, equitable concerns dictate that MIG and AAA should be held jointly liable. MIG and AAA are both dissolved corporations, whose only potential assets are their respective insurance policies. (Pl. Brief, p. 8, ¶ 2) The insurance policies were issued either to MIG or AAA separately, or to both corporations jointly. (Pl. Brief, Exh. D, Pl. State. Contested Facts, ¶¶ 149-56) The record is also clear Ter Maat intentionally diverted money from MIG to AAA, and did not use the money to properly close the site. (R. 612, 1979, 2092-95) Ter Maat never had any intention of using MIG assets to fund the closure and post-closure care of the site, and in fact intentionally bankrupted MIG so as to avoid paying such costs. (R. 54, 56-58, 2081-82, 2098-99) Under these circumstances, the court finds holding MIG and AAA jointly liable maximizes the insurance coverage available to satisfy some or all of their liability to plaintiffs. *See B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1206 (2d Cir. 1992) (in determining whether to impose joint liability, financial resources of the parties involved is one factor to consider).

Thus, MIG and AAA are jointly liable for 85% of past and future IRM costs consistent with the NCP, and 27.14% of past and future non-IRM costs consistent with the NCP. Consequently, MIG and AAA are jointly liable for

$4,136,685.38 in past response costs through December 31, 1997; and jointly liable for 85% of all IRM costs and 27.14% of all non-IRM costs incurred after December 31, 1997 which are consistent with the NCP. AAA's share as a transporter is still the same; AAA is additionally liable for $313, 552.26 in past response costs through December 31, 1997, and 4.74% of all non-IRM costs incurred after December 31, 1997, which are consistent with the NCP.

C. Whether MIG, AAA and Ter Maat Are Jointly Liable

As the above findings show, MIG, AAA and Ter Maat all operated the site during the same time period. Thus, the court agrees with plaintiffs that Ter Maat's individual liability as an operator should be joint with MIG and AAA, since all three parties conducted day-to-day operations at the site during the same time period. Ter Maat also received substantial sums from the sale of AAA in 1988. This court also found in its earlier decision that MIG, AAA and Ter Maat abandoned the site in 1988 without closure, thereby necessitating emergency clean-up costs, and failed to provide relevant site information or help in any way, hindering the clean-up process. Moreover, since Ter Maat is an additional insured on many insurance policies issued to MIG and/or AAA, plaintiffs have the same equitable considerations of wanting to maximize the available insurance coverage through a joint liability determination of the shares previously allocated to only MIG and AAA.

Thus, Ter Maat is jointly liable with MIG and AAA for 85% of past and future IRM costs consistent with the NCP, and 27.14% of past and future non-IRM costs

consistent with the NCP. Consequently, MIG, AAA and Ter Maat are jointly liable for $4,136,685.38 in past response costs through December 31, 1997, and jointly liable for 85% of all IRM costs and 27.14% of all non-IRM costs incurred after December 31, 1997, which are consistent with NCP. AAA's share as a transporter is still the same. Consequently, AAA is additionally liable for $313,552.26 in past response costs through December 31, 1997, and 4.74% of all non-costs incurred after December 31, 1997, which are consistent With the NCP.

Conclusion

For the reasons set forth above, judgment is entered for plaintiffs and against MIG, AAA and Ter Maat, jointly, for $4,136,685.38 in site costs through December 31, 1997, and for 85% of all IRM costs and 27.14% of all other site costs incurred after December 31, 1997, which are consistent with the NCP. Judgment is further entered for plaintiffs and against AAA for an additional $313,552.26 in site costs incurred through December 31, 1997, and for an additional 4.74% of all non-IRM costs incurred after December 31, 1997, which are consistent with the NCP. Defendants' request for oral argument is denied.

ENTER:

/s/_____
PHILIP G. REINHARD, JUDGE
UNITED STATES DISTRICT COURT

DATED: November 8, 2000

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS WESTERN DIVISION

[Filed July 29, 1998]

No. 92 C 20259

BROWNING-FERRIS INDUSTRIES OF ILLINOIS, INC., et al.
Plaintiffs,

v.

Richard TER MAAT, et al.,
Defendants,

MEMORANDUM OPINION AND ORDER

REINHARD, District Judge.

INTRODUCTION

Plaintiffs filed this action for contribution and declaratory relief pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, 42 U.S.C. §§ 9607 and 9613 and under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and

2202, seeking monetary damages against defendants for the past and future costs incurred to respond to environmental contamination at the MIG/DeWane Landfill Superfund Site located in Boone County, Illinois. The Court conducted a two-week bench trial in January 1998 and set a briefing schedule for the parties to submit post-trial briefs setting forth the issues and citing the trial evidence relevant thereto.[1] This order will decide the legal issues, make the necessary factual findings, allocate liability among the parties and assess damages against defendants where appropriate.

BACKGROUND

The site (also termed a facility as defined in CERCLA) at issue is an approximately forty-seven acre landfill located near Belvidere in Boone County, Illinois. The property during the entire relevant time period was owned by Raymond DeWane, Jean A. Farina and L.A.E., Inc. who leased it for operation of a landfill. It was operated as a landfill from February 1969 to June 1988. During that time, a variety of residential, commercial and industrial waste was placed in the landfill.

The landfill initially consisted of an excavated area which was lined with five feet of clay as required by the state landfill permit. About 45,000 cubic yards of waste were placed in the excavation between February 1969 and March 1971. The operator of the landfill during that time left it in

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[1] The court compliments the attorneys from both sides for the exemplary manner in which they tried this case and their extensive efforts in preparing the post-trial briefs.

poor condition and there was suspected contamination of the groundwater by leachate.[2]

In early 1971, the owners leased the landfill to Browning-Ferris Industries of Illinois, Inc. (BFI).[3] BFI sought and obtained a new landfill permit from the Illinois Environmental Protection Agency (IEPA) in May 1972 to operate the site. The landfill began receiving waste in April 1973, although on a limited basis. In September 1973, when a nearby landfill closed, the landfill began receiving waste on an unlimited basis. BFI operated the landfill until October 1975.

BFI's permit required a five-foot, compacted clay liner and a gravity-powered leachate collection system which fed into a surface impoundment. Additionally, daily, intermediate and final earthen cover was required.[4] There is no evidence to show that BFI did not comply with these requirements. During its operating period, BFI admittedly placed about 375,000 cubic yards of waste into the landfill. At the end of BFI's operation, it closed and placed a final cover over the

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[2] Leachate may be described as the end result of water leaching through a substance and collecting soluble compounds in the process.

[3] The original lease was to Rockford Disposal Service, Inc., the predecessor to BFI. The court will simply refer to the entities as BFI.

[4] Cover is a prescribed level of soil to be placed over the waste to prevent its movement by the wind and to retard the amount of rainwater reaching the waste.

area it had landfilled.

Beginning in October 1975, the owners leased the landfill to defendants.[5] Defendants operated the landfill from October 1975 to June 1988. During that time, they deposited approximately 3.5 million cubic yards of waste. MIG was the operator per the lease and AAA was a transporter to the landfill. Richard Ter Maat served as an officer of both corporations.

After filing a site closure plan with the IEPA, which was rejected because the owners refused to sign it, defendants left the landfill without properly closing it, including no final cover. MIG lacked the funds to effectuate a proper closure. AAA was sold, and Richard Ter Maat moved to Florida. Defendants took no part in operating or closing the landfill after June 30, 1988.

In August 1990, the United States Environmental Protection Agency (USEPA) placed the landfill on the national Priorities List (NPL) for clean-up under CERCLA. In October 1990 and again in March 1991, the USEPA and IEPA issued administrative orders on consent (AOC) to clean-up the landfill. Pursuant to these AOCs, plaintiffs were to: (1) conduct immediate waste stabilization measures, such as pump leachate from the surface impoundment, repair the impoundment berm and construct an interim cap on the landfill, (2) conduct a remedial investigation and feasibility

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[5] When the court refers to defendants, it means MIG, Inc,, AAA Disposal, Inc. and Richard Ter Maat.

study (RI/FS) pursuant to the NPL[6]; and (3) to pay past response costs and oversight costs incurred by USEPA and IEPA.

Plaintiffs filed this action in an effort to recover contribution for these costs, applicable interest and a declaration of liability as to future costs.[7] The future costs will depend on the Record of Decision (ROD) to be issued by USEPA which will set forth the needed measures to complete the clean- up and management of the landfill.[8]

Following the bench trial, the parties submitted post-trial briefs in which they set forth thirty-five issues to be decided by the court. The court will decide each of the issues in this order. The facts and evidence relevant to a particular issue will be discussed when the court decides that issue.

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[6] The purpose of an RI/FS is to collect data, evaluate releases of hazardous substances and to conduct engineering evaluations sufficient to allow federal and state agencies to select remedies.

[7] Defendants have never been involved with, or contributed to, the clean-up of the landfill despite their notification of potential liability by the USEPA and IEPA.

[8] As of the time of trial, plaintiffs suggested the ROD would be issued in February or March 1998. As of the date of this order, plaintiffs have not advised the court of the ROD's issuance.

Operator Liability

Plaintiffs assert liability against AAA and Richard Ter Maat as operators through theories of direct liability and derivative liability under state corporate veil-piercing law.[9] The court will first address the issue of direct liability.

1. AAA

The United States Supreme Court has recently spoken on the issue of when a party can be held directly liable as an operator under CERCLA. *See United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998).[10] At issue in *Bestfoods* was to what extent, if any, a parent can be held liable as either an owner or an operator of a hazardous waste site owned or operated by its subsidiary. The court answered that the parent can be found derivatively liable as an owner or operator only if the corporate veil may be pierced in light of the applicable state law. *Bestfoods*, 524 U.S. at ----, 118 S.Ct. at 1880-81. On the other hand, the parent can also be found directly liable as an operator, independent of any state veil-piercing law, if a plaintiff can show the parent actively participated in, and exercised control over, the

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[9] All parties stipulate that MIG was an operator at the site.

[10] This case was decided after the parties submitted their post-trial briefs. Plaintiff filed a motion to supplement its authority, citing *Bestfoods*, which defendants opposed. The court being aware of the *Bestfoods* decision independent of plaintiffs' motion, denied the motion as moot. Also, because of the *Bestfoods* decision, several of the joint issues need not be directly addressed.

operations of the site.[11] *Id.* at 1881. Any person or corporation who operates a site is directly liable for the costs of clean-up regardless of whether that person is the site's owner, the owner's parent corporation or business partner, or someone who sneaks in at night to discharge toxic waste at the site. *Id.* at 1885.

The difficulty comes in defining actions sufficient to constitute direct operation. *Bestfoods*, at 1885. Because the statute fails to adequately define the term "operator," the Supreme Court looked to its ordinary or natural meaning. In the organizational sense, which was the intent of CERCLA, operate means to conduct the affairs, manage, or operate a business. *Id.* (*citing American Heritage Dictionary* 1268 (3d ed. 1992)). Therefore, under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a site. *Id.* To sharpen this definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations. *Id.*

If the issue of direct liability as an operator is to be kept distinct from derivative liability, there must be no fusion

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[11] The court recognizes that the two corporate defendants here, MIG and AAA, did not have a parent-subsidiary relationship. Nonetheless, because of their common ownership and directorship, they are sufficiently analogous to a parent-subsidiary (sister corporations seems an appropriate description) to make applicable the tenets of *Bestfoods*.

of direct and indirect liability concepts. *Bestfoods*, at 1885. The question for direct liability is not whether the one corporation operates the other, but rather, whether it operates the site. *Id.* at 1886. Such operation is evidenced by participation in the activities of the site and not the subsidiary. *Id.* Control of the operating corporation, if extensive enough, gives rise to indirect liability under state law piercing doctrine, not direct liability under the statute. *Id.*

Having said that, the Court cautioned that it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary and that fact alone may not serve to expose the parent to liability for the acts of the subsidiary. *Bestfoods*, at 1886. This recognizes the well-established principle that directors and officers holding positions with a parent and its subsidiary can and do change hats to represent the two corporations separately despite their common ownership. *Id.* Therefore, it is not enough to establish direct liability as an operator that dual officers and directors made policy decisions and supervised activities at the site. *Id.* Rather, it must be shown that, despite the general presumption to the contrary, the officers and directors were acting in their capacities as officers and directors of the parent and not as officers and directors of the subsidiary.[12] *Id.*

The court went on to discuss various possible scenarios where a parent corporation could be found directly

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[12] Again, while the corporations in this case are not parent-subsidiary, they do share officers and directors. As such, the court finds the language of *Bestfoods* equally applicable here.

liable as an operator. The first is where the parent operates the site in the stead of its subsidiary or alongside the subsidiary in some sort of joint venture. *Bestfoods*, at 1887. The second possibility is where a dual officer or director might depart so far from the norms of parental influence exercised through dual office-holding as to serve the parent, even when ostensibly acting on behalf of the subsidiary in operating the site. *Id.* The third scenario is that an agent of the parent, with no hat to wear but that of the parent, might manage or direct activities at the site. *Id.* Norms of corporate behavior, undisturbed by any CERCLA provision, are crucial reference points. *Id.* The critical question is whether, in degree and detail, actions directed to the site by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's site. *Id.*

In the present case, the evidence shows that Richard Ter Maat, as an officer and director of AAA and MIG, was involved in the operational decision-making at the site. The dispositive question is whether his conduct and that of AAA was done outside the norms of corporate conduct so as to be considered done on behalf of AAA rather than MIG.[13]

The pertinent evidence establishes that MIG paid AAA a management fee to reimburse AAA, in part, for its performing certain administrative functions for MIG related

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[13] In considering the evidence on this issue, the court disregards the evidence related to AAA's control of MIG. Such evidence is clearly not pertinent to an analysis of direct liability as an operator under CERCLA. *See Bestfoods*, at 1886 ("The question is not whether the parent operates the subsidiary, but rather whether it operates the site. . . .").

to the site. Numerous outside parties who were involved with the site, including the IEPA and waste haulers, considered AAA to be the operator. Some venders sent correspondence and invoices to AAA for services related to site operations. Additionally, Richard Ter Maat sent several letters to the IEPA pertaining to operational matters at the site which he signed as president of AAA. He also sent a letter to the Illinois Division of Land/Noise Pollution Control pertaining to an operating permit for the site which was also signed by him as president of AAA. While defendants attempted to explain these letters away as aberrations, the letters speak for themselves. Furthermore, there are several letters from AAA's environmental consultant, M. Rapps Associates Inc., addressed to Richard Ter Maat and AAA which discuss pollution and clean-up issues at the site.

On the other hand, as defendants point out, there is also correspondence between Rapps and MIG and the IEPA and MIG which also pertains to operations at the site. All this shows, however, at best is that AAA and MIG both were involved as operators at the site. Nothing in CERCLA, or the case law interpreting it, prohibits a finding of more than one operator liable for a site.

The court finds that there is sufficient evidence, irrespective of the evidence related to AAA's control of MIG, to conclude that AAA was, at the very least, a joint operator of the site. As such, AAA bears direct liability under CERCLA for the clean-up costs. The court will determine AAA's share in a separate section of this order. Having found AAA directly liable as an operator under CERCLA, the court need not address the issue of whether AAA is liable indirectly under a veil-piercing theory.

2. Richard Ter Maat

While the *Bestfoods* decision offers significant guidance on the meaning of an operator for purposes of direct liability under CERCLA, the Court was careful to point out that CERCLA does not impinge on established corporate principles under state law. *See Bestfoods*, at 1880. Prior to *Bestfoods*, however, the Seventh Circuit held that a corporate officer could be held directly liable as an operator under CERCLA irrespective of state veil-piercing law. *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420-21 (7th Cir. 1994). This court respectfully believes that the *Bestfoods* case directly applies to, and therefore trumps, the *Sidney S. Arst* decision. Consequently, the only way plaintiffs can attribute individual liability as an operator to Richard Ter Maat, as an officer of both MIG and AAA, is derivatively under state veil-piercing law.

Efforts to pierce the corporate veil are governed by the law of the state of incorporation, *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 933 (7th Cir. 1996), which in this case is Illinois. In Illinois, a corporation's veil of limited liability may be pierced only if there is such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and if the circumstances are such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice. *Hystro Prod., Inc. v. MNP Corp.*, 18 F.3d 1384, 1388-89 (7th Cir. 1994). In determining whether to disregard a corporate entity, the court will consider a number of factors, including: (1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of

the debtor corporation at the time; (6) nonfunctioning of other officers or directors; (7) absence of corporate records; and (8) whether the corporation is a mere facade for the operation of dominant stockholders. *Ted Harrison Oil Co., Inc. v. Dokka*, 247 Ill. App.3d 791, 187 Ill. Dec. 441, 617 N.E.2d 898, 901 (4th Dist. 1993). The court may also consider whether the dominant individuals commingled corporate funds with personal funds or preferred themselves as creditors. *Id.* When such factors are coupled with some element of injustice or fundamental unfairness, the corporation will be considered as an aggregate of persons both in equity and law and its officers, directors and shareholders will be held liable for the corporation's obligations. *Id.* That being said, a court should reluctantly pierce the corporate veil. *Id.* The party seeking to have the corporate entity disregarded must come forward with a substantial showing that the corporation is really a dummy or a sham for a dominating personality. *Id.*

The present case is unique as the officers, directors and shareholders, of which Richard Ter Maat is more than one, chose to set up two corporations, one to operate the site (MIG) and another to haul garbage to the site (AAA). At first glance, one might be suspicious that two corporations were formed where one could do the job. But that is the nature of corporate law, and there are many legitimate benefits, not the least of which is related to taxes, that might motivate such an organizational move. Moreover, nothing in CERCLA purports to reject the bedrock common-law principle respecting corporate structure. *Bestfoods* at 1883. The particular structure and functions of the corporation alone do not justify attributing liability to Richard Ter Maat individually.

Plaintiffs contend that Richard Ter Maat is liable as the alter ego of MIG and AAA.[14] The court will assess this contention in light of the various factors recognized under Illinois law, keeping in mind plaintiffs' burden of a substantial showing.

First, there is no evidence of undercapitalization. While MIG did not have tremendous resources, it was able to function financially on its own for many years. Second, stock was issued by both corporations. Third, corporate formalities were in fact observed. The evidence shows that while Richard Ter Maat was president of each corporation, decisions were made collectively. Simply because Richard Ter Maat demonstrated a leadership role does not reflect dominance. Additionally, regular meetings were held and books were kept for both corporations. Both corporations also filed corporate tax returns. Similarly, each corporation employed a controller, Phil Stevens, to maintain corporate accounting functions. Fourth, the evidence shows that the other officers and directors performed specific, identifiable functions for each corporation. While Richard Ter Maat may have been the leader, it was not a one-man show. Fifth, although plaintiffs point to some questionable corporate minutes, the overall evidence demonstrates that corporate records were maintained for both MIG and AAA. Sixth, there is no evidence sufficient to show that either corporation was a mere facade for the operation of Richard Ter Maat. These foregoing factors do not justify piercing the corporate

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[14] Of course, plaintiffs need only pierce the corporate veil of either MIG or AAA to achieve their goal of attributing liability to Richard Ter Maat.

veil.

The remaining factors, while arguably supporting piercing the corporate veil of MIG, are insufficient to do so in light of the factors pointing the other way and plaintiffs' burden of a substantial showing. There was no evidence of any payment of dividends, although that is not entirely unusual in small corporations. As for the insolvency of MIG, it only became insolvent once the CERCLA obligations were imposed on it. Prior to that time, it maintained its own financial vitality. The fact that AAA prospered comparatively does not show MIG's insolvency. Lastly, there is some suggestion that AAA and Richard Ter Maat preferred themselves as creditors. Given the unusually low tipping rates charged AAA by MIG (irrespective of AAA's volume), the lease arrangement for heavy equipment and the management fees paid by MIG to AAA, it is evident that AAA prospered at MIG's expense. Such an arrangement is not entirely unusual as between two corporations. Ultimately, of course, Richard Ter Maat received the benefit of AAA's prosperity through the sale of AAA. Whether that was part of some grand fraudulent scheme or only last minute manipulations by a shrewd business person, the evidence simply does not answer. Hinting at or suggesting such matters is not enough in light of state corporate law. The court finds that plaintiffs have failed to prove a basis to pierce the corporate veil as to either AAA or MIG.

Admissibility of Parnello Affidavit

On June 24, 1988, BFI submitted, via its legal counsel, the affidavit of one of its employees, Joseph E. Parnello, to the United States Environmental Protection

Agency (USEPA). The letter accompanying the Parnello affidavit states, in pertinent part, that the affidavit is submitted in response to the USEPA's contention that BFI "has a continuing obligation to supply information relevant to Belvidere Municipal Landfill No. 1." The letter further states that the Parnello affidavit "attests to the types and volumes of waste hauled from the Chrysler plant . . . to the Belvidere Municipal Landfill No. 1 from 1967 to 1973." It further asserts that Parnello "started hauling Chrysler's waste in 1967 and continues to haul this waste to this day." The letter also includes a list of the types and approximate amounts of waste hauled from Chrysler for the seven-year period.

Parnello's affidavit itself states, in relevant part, that Parnello was hauling Chrysler waste to a BFI landfill in Davis Junction, Illinois and that he had hauled Chrysler waste to the Belvidere Municipal Landfill No. 1 from 1967 to 1973. Parnello also states that "[a]ll of the waste [he] hauled from Chrysler was taken to the Belvidere Municipal Landfill No. 1 until the landfill closed in 1973." The Parnello affidavit further states that during the seven-year period he hauled: approximately 15,000 gallons of infilco sludge every two months, approximately three to five 20 cubic yard loads per week of paint sludge, approximately three to five loads of fly ash per week depending on the season, approximately two to five 30 yard loads of metal debris and scrap per week and approximately two 15 yard loads per day of industrial wastewater sludge. According to Parnello, Chrysler also disposed of about sixty drums of waste per week, with some of the drums containing solvents, tar or metal scraps.

Defendants seek to admit the Parnello affidavit as circumstantial evidence of what type and volume of Chrysler

waste was hauled by Parnello during the period of 1973 to 1975. Plaintiffs contend the affidavit is inadmissible hearsay.

Federal Rule of Evidence 801(d)(2) governs the admissibility of the Parnello affidavit. Rule 801(d)(2) provides that an admission by a party opponent is not hearsay, and therefore admissible, if it "is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship. . . ." Parnello's affidavit, while arguably admissible under subsection (A), qualifies as an admission by BFI under subsection (B), (C) and (D). The cover letter by BFI's attorney reflects that BFI had adopted a belief in its truth as it was submitted to the USEPA and also that BFI authorized Parnello to make the statement. Additionally, as to subsection (D), Parnello was an employee of BFI at the time he made the affidavit and it concerned a matter within Parnello's employment. Accordingly, the court admits the Parnello affidavit as an admission by BFI.

Chrysler Waste

The parties have presented the twin issues of whether an adverse inference can be drawn based on Chrysler's alleged failure to produce all documents relevant to disposal of its wastes for the period 1973 to 1975 and whether such an inference can be attributed to BFI for its similar failure. A related issue is whether section 103(d) of CERCLA, 42

U.S.C. § 9603(d), required BFI to retain all records of its operation at the site. The court finds it unnecessary to decide these issues as there is sufficient evidence to infer that Chrysler waste did in fact go to the site during the period 1973 to 1975.

The undisputed evidence shows that Parnello, a BFI employee, exclusively hauled the Chrysler waste from at least 1967 to 1973. Additionally, the undisputed evidence demonstrates he exclusively hauled Chrysler waste after 1975. Other evidence strongly suggests that he also hauled the Chrysler waste from 1973 to 1975.

The big mystery, of course, is where did he haul it during the 1973-75 period. In that regard, the evidence shows that from 1967 to 1973 Parnello hauled all of the Chrysler waste to BFI's site at Belvidere Municipal Landfill No. 1 and that from 1975 forward he hauled it to BFI's new site at Davis Junction.[15] David Boque, a management level employee of Chrysler, testified by deposition that he was aware of Parnello hauling Chrysler waste to Belvidere Municipal Landfill No. 1 before 1973 and to Davis Junction from sometime in 1975 thereafter. Curiously, Boque had no knowledge of where Pamello hauled Chrysler waste from 1973 to 1975. Furthermore, BFI applied for a permit in early 1973 from Illinois Environmental Protection Agency to deposit liquid wastes from Chrysler in the site.

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[15] The evidence shows that for a short time in 1975 he hauled Chrysler waste to the Pagel Pit in Rockford, Illinois. That was between the time BFI relinquished control over the site and when it opened its new operation at Davis Junction.

Additionally, an employee of BFI at the site, Kenneth Bodey, testified at trial that while he worked there Parnello hauled Chrysler waste to the site. According to Bodey, once or twice a week Parnello would bring in a twenty-yard container containing two different sludges. One sludge Bodey described as purple in color with a stiff consistency which he referred to as number five sludge and described as paint sludge. The second sludge, referred to as number seven sludge, was gray in color with a soft, but not liquid, consistency. Bodey described this as sewage sludge. Neither sludge smelled like solvents. Bodey also testified he saw Parnello bring infilco waste into the site in a twenty-yard box. According to Bodey, he also saw fly ash and cinders hauled into the site by Parnello, at a rate in the winter of two to three loads per day. To Bodey's knowledge, BFI's trucks went only to the site and no other landfill while BFI operated the site. While Bodey saw Parnello haul drums into Belvidere Municipal Landfill No. 1, he never saw him haul drums to the site.

Cleatos Atkinson, the former general manager of BFI, testified, and the documentary evidence shows, that in mid-1975 BFI sought and received significant hauling and disposal rate charges for liquid waste in the agreement covering 1973 to 1976. This was at about the same time BFI began hauling Chrysler waste to Pagel Pit and then Davis Junction.

When the court views this evidence in its entirety, the inescapable conclusion is that BFI hauled Chrysler waste, including sludges and infilco waste, to the site during the period of 1973 to 1975. The more difficult questions are how much was deposited and to what extent did these wastes contain solvents.

In that regard, the court finds persuasive the expert opinion of defendants' witness, Paul R. Ammann. According to Ammann, BFI contributed approximately 3,430,000 pounds of solvents to the site between April 1973 and June 1975.[16] This amount is based on the number of vehicles manufactured by Chrysler during this time period and the approximate amount of solvent-bearing waste generated therefrom. According to Ammann, the 3.4 million pounds of solvents deposited by BFI at the site represents about 91 percent of the total solvent content at the site.[17] The question of the impact of solvents at the site will be addressed when the court decides the allocation issue.

Appropriateness of Damages Under the NCP

Defendants contend that plaintiffs have failed to carry their burden of proving that the response costs they seek to recover were both necessary and consistent with the National Contingency Plan. Peppers counsel for defendants[18] further

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[16] This conclusion is based on the assumption that BFI dumped all the Chrysler waste during the relevant period at the site. In its prior discussion, the court has already found such assumption to be supported by the evidence. The court, therefore, finds that about 3,430,000 pounds of solvents are attributable to BFI's hauling of Chrysler waste to the site.

[17] Ammann attributed the remaining nine percent to MIG based on the amount and nature of municipal and industrial trash hauled by MIG during its operating period as per records.

[18] *See Maryland Casualty Co. v. Peppers*, 64 Ill.2d 187, 355 N.E.2d 24 (1976) (Insured entitled to independent counsel

identifies 13 examples which he contends are not recoverable special damages.

Section 107(a)(4)(B) of CERCLA imposes liability on potentially responsible parties (PRPs) for "any other necessary costs of response incurred by any other person consistent with the National Contingency Plan." 42 U.S.C. § 9607(a)(4)(B). Proof that a private party's response costs were consistent with the NCP is an element of a private cost recovery action under CERCLA. *Bancamerica Commercial Corp. v. Trinity Indus., Inc.*, 900 F.Supp. 1427, 1451 (D.Kan. 1995). The 1990 NCP, which applies to this action, specifies that any response action "carried out in compliance with the terms of an order issued by EPA pursuant to section 106 of CERCLA, or a consent decree entered into pursuant to section 122 of CERCLA will be considered 'consistent with the NCP.'" 40 C.F.R. § 300.700(c)(3)(ii). Private party response actions not made pursuant to an EPA order or decree require substantial compliance with a list of requirements in order for the response action to be considered consistent with the NCP. 40 C.F.R. § 300.700(c)(5)-(6). Response actions taken pursuant to an EPA order or decree will be found consistent with the NCP if the actions were in compliance with the order or decree. *Trinity Indus.*, 900 F.Supp. at 1452; *United States v. Colorado & Eastern R.R. Co., Inc.*, No. 89-C-1786, 1993 WL 350171 (D.Colo. 1993), *afl'd*, 50 F.3d 1530 (10th Cir. 1995); *Central Maine Power Co. v. F.J. O'Connor Co.*, 838 F.Supp. 641, 647 (D.Me.1993). In fact, there is an irrebuttable presumption that actions taken pursuant to the terms of an EPA consent decree are consistent

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where potential conflict of interest exists under insurance policy.)

with the plan. *Central Maine Power*, 838 F.Supp. at 647.

In this case, the undisputed evidence shows that the response costs sought by plaintiffs were for actions taken pursuant to two administrative orders on consent executed after April 9, 1990. Therefore, the court finds the costs are consistent with the NCP.

Defendants contend that the oversight costs sought by plaintiffs related to the emergency removal and RI/FS activities are not recoverable, relying on *United States v. Rohm and Haas Co.*, 2 F.3d 1265 (3d Cir. 1993). The Seventh Circuit has not addressed the issue. Two other circuit courts of appeals have, in addressing the issue, rejected the conclusion and reasoning of the *Rohm* case. *See United States v. Lowe*, 118 F.3d 399 (5th Cir. 1997); *see also Atlantic Richfield Co. v. American Airlines, Inc.*, 98 F.3d 564 (10th Cir. 1996) (limiting *Rohm* to the narrower circumstance of removal actions).

After carefully reading all three cases and the applicable statutory provisions under CERCLA, the court respectfully disagrees with the Third Circuit and follows the decisions of the Fifth and Tenth Circuits. It appears that allowing oversight costs to be recovered best serves the broad remedial purpose of CERCLA and promotes the effective clean-up of environmental hazards. Accordingly, the court finds that plaintiffs are entitled to recover all of the oversight costs of the USEPA and IEPA.[19]

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[19] Even if the court were to follow the *Rohm* decision, the oversight costs related to the RI/FS activities would still be

Defendants, alternatively, contend that certain costs are not recoverable and present an enumerated laundry list of contentions and commentary as support for their position. The court finds that the evidence supports plaintiffs' claims for costs as to all these matters. Only two warrant further discussion.

First, defendants contend plaintiffs' additional expenses of $392,055.89 in PRP search costs were duplicative and done in anticipation of litigation. Patrick McGrath, vice-president of Peterson Consulting, testified that $378,450 was expended to identify PRPs through the identification of generators and transporters and the specific volumes of waste they hauled or sent to the site. According to McGrath, this function was necessary to facilitate the *de minimis* settlement process. Furthermore, McGrath's expert report shows a delineation of the various tasks conducted by Peterson Consulting as part of the PRP search process. The court agrees that PRP search costs are not limited to the name of the PRP alone. Information related to who brought what and how much is particularly relevant to the *de minimis* settlement process. McGrath's testimony and report sufficiently support the claim for the costs related to the PRP search process. Therefore, the court finds plaintiffs are entitled to the full amount sought.

Second, defendants contend that plaintiffs' claims for attorney fees are not recoverable because such claims are vague and plaintiffs have not shown they are "closely tied" to the actual clean-up. Plaintiffs respond that they are not

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recoverable.

seeking recovery for items related to litigation support in Golden & Associates' bills, that the bills from the law firms of McDermott, Will & Emery and Kirkland & Ellis are for administrative services provided to the MLTF and not legal services and that the computerized legal research charge from Lathrop & Norquist was for locating PRP addresses.

While plaintiffs' claims include some work performed by attorneys, they have shown it is "closely tied" to the actual clean-up activities. Defendants' objections do not specify particular costs that are attributable to litigation matters versus clean-up matters. Defendant agreed to do so where they believed there were discrepancies, and the court will not comb the record in search of such problems. Plaintiffs have sufficiently shown that their costs of $8,036,608.87 are necessary and consistent with the NCP.

Allocation of response costs associated with the emergency removal actions and the interim remedial measures (IRM)

Plaintiffs' expert, Edwin Raymond, testified in his trial affidavit that the costs associated with the emergency removal actions and the IRMs were $2,305,183.44 as of December 31, 1997. Plaintiffs contend that defendants[20] should be responsible for this entire amount because of their failure to properly close the site when they abandoned it in 1988. Plaintiffs further maintain that there will be future operation and maintenance costs associated with the IRMs and that the

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[20] The court has already decided that Richard Ter Maat has no individual liability as an operator under either CERCLA or state veil-piercing law.

court should enter a declaratory judgment attributing all of the future costs to defendants.

Defendants respond that they should not be held liable for the full amount of the emergency removal and IRM costs because the presence of solvents, which were introduced by BFI, caused the emergency and interim remedial response. Defendants further contend that a portion of the costs should be attributed to the owners of the site because they had a legal obligation to participate in the proper closure of the site which was not eradicated by the agreement between the owners and defendants.

As will be seen in more detail later in this order, allocation of response costs is far from an exact science. This is equally true in the context of who should pay what for the emergency removal and IRM costs. Here, there are three potential parties: plaintiffs, defendants and the owners. The court will discuss each.

As for BFI, there is simply no evidence, expert or otherwise, to show that anything they did attributed to the need to take emergency removal and IRM action. There has been no showing that the toxicity contributed by BFI via the Chrysler waste stream caused these actions to be taken. While such toxicity will have an impact on the court's allocation for the other clean-up costs, it has no effect in this context. There is also no showing that anything else BFI did years before contributed in any way to the emergency nature of the initial response and the interim measures taken. There is also no evidence that BFI's closure of the site in 1975 contributed to these costs. Nor did the law impose any obligation on them to effect closure in 1988. Therefore, the

court attributes zero percentage of the emergency removal and IRM costs to plaintiffs.

As for defendants, they clearly had an obligation under applicable regulations to properly close the site. It is also undeniable that they failed in this undertaking. Further, the experts, both plaintiffs' and defendants', agree that failure to properly close the site contributed to the need for emergency removal and IRM activities. Defendants left the site without proper slope and without a proper cap which resulted in excessive ponding of water and runoff of water, both of which contributed significantly to the extensive leachate problem. There is no doubt that had the site been properly closed the need for emergency and interim actions would have been minimized. Defendants must share significantly in the costs for the emergency removal and IRMs.

That leaves the owners. Plaintiffs contend the owners should escape responsibility because they had an agreement with defendants that gave defendants the obligation to close the site. Nevertheless, the law places the responsibility for closure on both the owners and defendants. This obligation could not be bargained away. The evidence shows that, not only did the owners fail to take any action to close the site, they interfered with defendants proposal to do so by refusing to sign off on the closure plan submitted to the IEPA. While the court does not express an opinion on defendants' proposed closure plan, the key at this point is that the owners' refusal to become involved reflects a hands-off approach contrary to their legal obligations. As will be discussed more thoroughly later in this order in the allocation issue, the owners could not sit back and reap great financial rewards from their land while the very use of the land for which they benefitted

contaminated the environment. Equity, which is the underpinning of the allocation process, will not allow it.

Having determined that defendants and the owners share the responsibility for the costs associated with the emergency removal and IRM activities, the court must decide what share each will bear. Of course, there can be no exactitude in this process.

That being said, and having carefully considered the evidence, including the expert reports and testimony, the court finds that defendants are eighty-five percent responsible and the owners are fifteen percent responsible. This division of responsibility is based on the fact that the operators were in the best position to effectuate a closure but refused to do so. While the owners foiled defendants' attempt to seek approval from the IEPA for defendants proposed closure, that did not prevent defendants from closing the site anyway. It was a poor exercise of judgment by defendants to throw up their hands and walk away simply because of the lack of cooperation by the owners.[21] A proper closure would have made a significant impact on the cleanup and response costs. On the other hand, the owners are not squeaky clean in all of this. Their persistent inclination to stick their heads in the sand is an irresponsible approach that cannot be overlooked. Had they and defendants worked together to close the site, which the law contemplated them doing, much environmental

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[21] While the parties could not bargain away their legal obligations, the fact that defendants had the sole responsibility for closure under the agreement further reflects their poor judgment in abandoning the site without effective closure.

harm could have been avoided. As for future costs related to the IRMs, the court enters a declaratory judgment against defendants and the owners based on these percentages.

Whether MIG and AAA [22] should be considered a single party for purposes of allocating response costs

Plaintiffs contend that section 2(a)(2) of the Uniform Comparative Fault Act should apply and that MIG and AAA should be treated as a single party for allocation purposes. The court disagrees. In a contribution action such as this one under section 113 of CERCLA, defendants are severally liable and plaintiffs have the burden of allocating the harm to each defendant. *See Ninth Ave. Remedial Group v. Allis Chalmers Corp.*, 974 F.Supp. 684, 688 (N.D.Ind. 1997). While it is true that MIG and AAA share the role of operator, they cannot share the liability. Any allocation of liability will take into consideration their dual role as operators of the site during their period of operation. In all likelihood each will bear an equal share of their joint allocation which will be decided in the allocation portion of this order. Such a result would not be inconsistent with several liability under section 113.

Whether defendants can be declared liable for future response costs pursuant to section 113(g)(2) of CERCLA

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[22] Plaintiffs contend all three parties, MIG, AAA and Richard Ter Maat should be treated as one. This court has held in a separate part of this order, however, that Richard Ter Maat cannot be held individually liable as operator either directly or derivatively.

Defendants object to the entry of a declaratory judgment against them for future response costs in the form of final remedial action. Defendants contend such costs are too speculative to base a declaratory judgment on. Defendants also argue that because the baseline risk assessment's focus shifted from solvents to metals after the close of discovery that they will be denied due process if they are not allowed to explore the bases for the metals-division remedy for future clean-up.

Section 113(g)(2) of CERCLA provides that "[i]n any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." This language reflects Congress's intent to insure that a responsible party's liability, once established, will not have to be relitigated. *American Nat'l Bank and Trust Co. of Chicago v. Harcros Chem., Inc.*, No. 95 C 3750, 1997 WL 281295, at *12 (N.D.Ill. May 20, 1997). The entry of a declaratory judgment as to liability is, therefore, mandatory under CERCLA. *Id.* (*citing United States v. USX Corp.*, 68 F.3d 811, 819 (3d Cir. 1995)). Moreover, the fact that future costs are speculative is no bar to a present declaration of liability. *Id.* Additionally, defendants do not cite, and the court cannot find, any authority recognizing a due process claim in this context. Defendants have had the same opportunity as plaintiffs to consider and respond to the USEPA's approach to this case. Allocation responsibility can be assessed at this point and applied to future response costs.

Whether plaintiffs are entitled to interest from defendants on plaintiffs' costs related to the site

Plaintiffs seek interest at the rate of 5.6% for a period from January 31, 1995, the date they served a demand letter upon defendants, to the date of judgment. Defendants only objection is to reiterate their contention that plaintiffs are not entitled to recover certain underlying clean-up costs as argued in other sections of their post-trial brief. Defendants do not raise any argument directly in opposition to the imposition of interest for the period or the rate sought.

Because section 107(a) allows for interest, and defendants have not directly objected to its imposition, the court will award interest for the time period and rate sought. Such an award will only apply, however, to the percentage of costs awarded to plaintiffs and against defendants as set forth in other sections of this order.

Whether solvents caused the listing of the site on the National Priorities List (NPL) or caused any element of the remedy

As plaintiffs correctly point out in their reply brief, the issue of what caused the site to be placed on the NPL is of no consequence as to what remedies are ultimately necessary to clean up the site. On the other hand, while plaintiffs' experts point to the remedies as being driven by the presence of metals, there is also evidence that volatile organic compounds (VOCs) are also present in significant levels. Furthermore, VOCs, while present in solvents, are also found in ordinary municipal and industrial waste.

It cannot be said that the remedies in this case are entirely independent of solvents. The court has already found that Chrysler waste, which included solvents, was placed in the site during the BFI period. It may prove impossible to separate the solvent from the non-solvent VOCs. That, however, supports the court's conclusion that the remedies are likewise indivisible. Accordingly, the court finds that solvents are, in part, causing some elements of the remedy. The court will apportion this causation in its allocation discussion.

Whether defendants closed the site on June 30, 1988

Plaintiffs contend that under the state environmental regulations applicable at the time, *see* Ill.Admin. Code tit. 35, §§ 807.101 *et seq.* (807 regulations), defendants failed to properly close the site but instead abandoned it. Defendants make a half-hearted response, essentially blaming the owners and the IEPA for preventing them from properly closing the site.

The court will take little time addressing this issue. While several aspects of this case are murky, it is crystal clear that defendants walked away from the site without properly closing it. No legitimate argument can be made that defendants did not abandon the site within the meaning of the 807 regulations. Therefore, the court finds that the site was not closed by defendants on June 30, 1988 or anytime thereafter.[23]

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[23] Such facts as the owners' recalcitrance and defendants' legitimate attempts to close, if any, will be considered in allocating

Whether defendants should bear any of the orphan share

An orphan share in the context of CERCLA contemplates an inability to account for all hazardous waste streams or to assign a measure of monetary responsibility to an otherwise responsible party. *United States v. Kramer*, 953 F.Supp. 592, 595 (D.N.J.1997). The parties here do not take issue with this definition. Rather, they disagree as to whether defendants should bear any of the orphan share in this case.

In a contribution action such as this one, the court enjoys broad discretion to consider and apply such equitable factors as it deems appropriate to achieve a just and fair allocation among liable parties. *Kramer*, 953 F.Supp. at 597. Section 113(f) permits the court to allocate response costs to all liable parties. *Id.* at 598. Thus, nothing in CERCLA or its legislative history prohibits the court from allocating orphan shares to all liable parties. *Id.*; *see also Charter Township of Oshtemo v. American Cyanamid Co.*, 898 F.Supp. 506, 508 (W.D.Mich. 1995) (in a section 113(f) contribution claim, the orphan shares must be equitably apportioned among all solvent PRPs). Furthermore, the orphan shares should be apportioned to the PRPs (both plaintiffs and defendants) according to their relative equitable share. *Kramer*, 953 F.Supp. at 598; *Charter Township*, 898 F.Supp. at 509.

The court agrees with the analysis in *Kramer* and *Charter Township* and rejects the contentions of defendants. To allocate orphan shares to all liable parties is not

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costs.

inconsistent with several liability under section 113. Additionally, such an approach is entirely consistent with equitable considerations applicable to an allocation scheme under section 113. To properly effectuate the purposes of CERCLA, all liable and solvent parties must share the cost in proportion to their relative fault.

In this case, plaintiffs' expert, William Hengemihle, testified that approximately 34,615 cubic yards of waste are attributable to orphan operators and about 510,580 cubic yards to orphan transporters. According to Hengemihle, the total orphan share is 1.58 percent to be distributed on a pro rata basis to all parties. Defendants have not countered this allocation. Accordingly, the court accepts Hengemihle's apportionment of the orphan share to the respective parties, including defendants.

Whether BFI violated its landfill permit by failing to remove the waste deposited in the Kennedy-Mollendorf area prior to May 5, 1972

It is undisputed that BFI's landfill operating permit, issued by the IEPA, contained a special condition, among others, requiring BFI to remove the waste from the Kennedy-Mollendorf area and to seal the area according to design specifications. It is further undisputed that BFI never met that condition. What is in dispute is whether the IEPA modified BFI's permit by allowing BFI to leave the waste but requiring it to take certain actions, including covering the waste with clay.

It is not clear whether BFI actually complied with the substitute conditions, even if they were approved by IEPA.

Contrary to BFI's assertion in its post-trial brief, Raymond De Wane did not testify that BFI complied with the special conditions. Rather, De Wane testified that cover was placed on the Kennedy-Mollendorf area during its use prior to BFI becoming the operator. There is some indication that BFI covered the Kennedy-Mullendorf area and that they placed no additional waste there, as reflected by the site characterization memorandum. There is no evidence however, to show that the other conditions were met.

Nonetheless, the court cannot conclude that the IEPA ever formally approved the substitute conditions. Clearly, several letters from the IEPA to BFI during the early to mid-part of 1973 reflect the IEPA's insistence that the original condition be met and that BFI remove the waste from the Kennedy-Mollendorf area. The memorandum from the July 23, 1973, meeting between BFI, Wallace Koster and the IEPA is nothing more than that, a memorandum. It is far from an official authorization from the IEPA. In fact, one would expect a supplemental permit to have issued had the IEPA formally approved the change. The fact that the IEPA records after July 23, 1973, do not indicate a continued belief by the IEPA that BFI was violating its permit is not particularly persuasive.

Therefore, the court finds that the original condition of the permit regarding the Kennedy-Mollendorf area was not modified or substituted for by the IEPA. Having reached that conclusion, the court finds that BFI did not comply as it never removed the waste. The significance of this finding, if any, will be addressed in the allocation section of this order.

Whether Richard Ter Maat's deposition testimony can be considered substantively as admissions of a party where he also testified at trial

Richard Ter Maat's deposition testimony contains admissions by a party and is, therefore, admissible as substantive evidence. Fed.R.Evid. 801(d)(2). It may be used as substantive evidence at trial even if Ter Maat testifies (which he did here). Fed.R.Civ. P. 32(a); *Aircraft Gear Corp. v. Kaman Aerospace Corp.*, No. 93 C 1220, 1996 WL 65990, at *1 (N.D.Ill. Feb. 12, 1996); *W.R. Grace & Co. v. Viskase Corp.*, No. 90 C 5383, 1991 WL 211647, at *2 (N.D.Ill. Oct. 15, 1991).

Having said that, the court also finds the submitted evidence from Ter Maat's deposition to be vague and of little evidentiary value. Much of what Ter Maat testified to regarding his activities related to the site could apply equally to his role as an officer of MIG. Absent an opportunity for further explanation, such statements have little evidentiary weight.

The environmental conditions at the site prior to October 1975 and whether BFI and the owners had a duty to disclose those conditions to defendants

Defendants contend that the groundwater at the site was "contaminated" prior to their becoming operators in October 1975, that BFI and the owners had a duty to disclose the condition and that they wilfully failed to disclose the condition in an effort to spread liability under CERCLA. Defendants assert that this failure to disclose should effect the allocation of responsibility for response costs.

Wallace Koster testified that as of March 1972 he believed there was a "strong likelihood" that the groundwater at the site was being polluted by previous refuse disposed of at the site. In fact, Koster stated such possibility in a letter to the Illinois Division of Land Pollution Control (predecessor of the IEPA) as part of the application process to operate the site in March 1972.

According to Koster, he believed as of March 1972 that due to the geological conditions of the Kennedy-Mollendorf area that it would "in all likelihood lead to groundwater pollution." Furthermore, a testing company hired to test the groundwater sent results to Koster stating that two of the water samples "had a distinct garbage odor" which indicated that leachate was contaminating the groundwater. BFI also admits that the groundwater samples from 1971-72 showed increases in metals, clorides, hardness and dissolved solids. According to BFI, no tests were done to ascertain if any solvents or VOCs were in the water.

Ter Maat testified that he requested the information submitted by Koster from the IEPA but the IEPA refused to provide it because BFI considered the information a trade secret. According to Ter Maat, the IEPA refused to provide the information on "many, many occasions." There is no evidence to show that BFI ever made Ter Maat aware of the "strong likelihood" of groundwater contamination or of the test report stating that the groundwater samples smelled like garbage or contained increased levels of metals, chlorides, hardness and dissolved solids.

It is not necessary for the court to now conclude whether BFI had a hard and fast duty to disclose such

information back in 1972. On the other hand, the court considers such evidence relevant to the issue of BFI's conduct as it bears on the equitable considerations of allocation.

Whether the settlement by BFI and CNA Insurance Companies is admissible to show bias of plaintiffs' allocation expert and the ability to pay of the owners

During trial, defendants sought to have Floyd Wisher, an attorney who had represented the CNA Insurance Companies (CNA), testify regarding a settlement agreement entered into between BFI and CNA pertaining to numerous insurance policies and insureds. Defendants contended at that time that such evidence was relevant to the issue of the owners' ability to pay and to the issue of the bias of the proposed allocation by BFI to be attributed to the owners. Wisner then testified as an offer of proof. After hearing Wisner's testimony via the offer of proof, the court ruled that it did not consider the evidence admissible but would reconsider after the parties briefed the issue post-trial. The parties submitted their post-trial briefs on this issue under seal, as the transcript of Wisner's testimony on this issue was under seal.

In their post-trial brief, defendants contend that Wisner's testimony shows that BFI and the other plaintiffs "postur[ed] with their experts to assign a minimal amount of liability through their allocation expert to the owners." In essence, defendants contend that Wisner's testimony is relevant to attack plaintiffs' allocation scheme and the motivation for it. Plaintiffs contend such evidence is irrelevant and not admissible under Rule 408 of the Federal Rules of Evidence.

Rule 408 generally prohibits evidence of settlement negotiations except "when the evidence is offered for another purpose, such as proving bias or prejudice of a witness. . . ." In this case, Wisner's testimony is offered to show the bias or prejudice of plaintiffs' allocation expert.

The court stands by its original ruling that such evidence is inadmissible. There must be significant reason to admit evidence of otherwise confidential settlement agreements under Rule 408. Defendants have simply not established the nexus between BFI's settlement dealings with CNA and BFIs' allocation expert's opinion as to what allocation is attributable to the owners. Clearly, because BFI settled with the owners and therefore acquired the owners' allocation responsibility, it is motivated to keep that allocation as low as possible. There is no showing that the settlement with CNA injected any bias into the allocation expert opinion that would not otherwise be there as a result of the allocation expert being a witness testifying on behalf of BFI.

Limit of plaintiffs' contribution rights

This is really a non-issue in this case. It appears from the post-trial briefs that the issue is based on semantics and that the parties agree in substance that plaintiffs are entitled to seek contribution for $8,036,608.87 before any settlement set-offs and allocation are applied or any pre-judgment interest is assessed.

Whether BFI complied with the lease requiring it to provide insurance for, and indemnify, the owners

The relevance of this issue eludes the court. Even if

defendants could establish that BFI did not comply with the insurance and indemnity provisions of the lease between BFI and the owners, that is of no concern to defendants. More importantly, it is of no concern to the court.

Whether MIG complied with its lease provisions relating to rental payments, insurance agreements, indemnities and closure of the site

The court agrees with defendants that the issue of whether MIG complied with the lease requirements as to rent, indemnity and insurance has no relevance to this case. The issue of MIG's alleged violation of its lease is no more relevant than the issue of BFI's compliance with its lease.

As for the lease provisions pertaining to conditions at, and closure of, the site, while arguably relevant, they are of negligible weight. There is ample evidence, independent of the lease, upon which the court can assess MIG's activity as it related to operation and closure of the site. It is the impact of that activity on the site, not its effect on the lease, that is critical to this court's allocation assessment.

Whether MIG violated its operating permit by irrigating the landfill with leachate

It is undisputed that MIG did in fact recirculate leachate from the leachate pond back into the landfill and that such a practice was in violation of its operating permit. It is also undisputed, however, that inspectors for the IEPA were aware of this practice and never cited it as a permit violation. According to Robert Wengrow, who was in charge of the regional IEPA office having jurisdiction over the site, it was

customary during that time period to handle leachate that way because there was nothing else that could be done with it.

It is clear that MIG violated its permit by pumping the leachate from the collection pond back into the landfill. It is equally clear, however, that the IEPA was aware of the practice and allowed it to continue. While the IEPA's ratification of MIG's conduct does not eradicate MIG's responsibility, it does mitigate it significantly. The court will consider the entire circumstance of the situation when determining MIG's allocation responsibility.[24]

The legal effect of the settlement proceeds received by plaintiffs

Plaintiffs have entered into settlement agreements with sixty-four parties regarding response costs who, in turn, assigned their contribution claims to plaintiffs. Further, the USEPA reached a *de minimis* settlement with several PRPs as to response costs, with sixty-eight settlers assigning their

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[24] This circumstance epitomizes the overall problem with assessing liability in a CERCLA case such as this. The "science" of landfilling has changed, and continues to change, dramatically in twenty plus years. Back in the mid-1970's and into the 1980's the state and federal agencies were in their fledgling stages of development. Additionally, the laws governing landfill operation were just coming into bloom. Now, of course, the court must assess in hindsight the actions of the operators through a present day lense. Imposing today's standards on yesterday's conduct is an inartful task at best.

contribution claims. Defendants contend that the actual amount of the settlements with the *de minimis* settlors and the third-party defendants should be credited against the RI/FS costs before any further allocation is determined. As for the settlement between plaintiffs and the owners, defendants contend that the owners actual allocated liability (as determined by the court) be setoff rather than the amount of the settlement itself.

There are two recognized approaches for crediting the contribution of settling parties. One, the *pro tanto* rule considers the settlement amount. *See Atlantic Richfield Co. v. American Airlines, Inc.*, 836 F. Supp. 763, 766 (N.D.Okla. 1993). The other is the proportionate credit rule which applies the actual amount of allocated liability of the settling party. *See Allied Corp. v. Acme Solvent Reclaiming, Inc.*, 771 F.Supp. 219, 223 (N.D.Ill. 1990). Under the circumstances of this case, the court will apply the proportionate credit rule as that is the rule followed by courts in this circuit and by the majority of courts addressing the issue. *See, e.g., United States v. SCA Serv. of Indiana, Inc.*, 827 F.Supp. 526, 533-36 (N.D.Ind. 1993); *Allied Corp.*, 771 F.Supp. at 223; *Edward Hines Lumber Co. v. Vulcan Materials Co.*, No. 85 C 1142, 1987 WL 27368, at *2-3 (N.D.Ill.1987). As such, the court will consider the allocation amount for the settling parties when it takes up the allocation issues.

Whether the owners had responsibility for leachate management at the site

The evidence does not support defendants' contention that the owners had responsibility for leachate management at

the site. They rely on the 1972 permit application which provides that treated leachate would be used periodically to irrigate the owner's fields and that the owners would maintain the completed landfill. This certainly implies that the owners had responsibility for leachate maintenance once the site was completed (or closed). It does not imply, however, that they had responsibility for the leachate during the active operation of the site. Of course, the evidence shows that the site never was completed (or closed). Hence, any responsibility owed by the owners never came to fruition.

Moreover, even if it is assumed that the actual permit incorporated the permit application parameters, the permit changed the leachate requirement as to irrigating the fields. Thus, any contemplated responsibility for leachate management by the owners was eradicated when the IEPA disapproved the method called for in the permit application. Therefore, the court finds the owners had no responsibility for leachate management at the site.

The proper method of allocating response costs

The landfill at issue in this case was in existence and actively operated from the late 1960s to the late 1980s. For twenty years, a variety of waste was brought to, and deposited in, the landfill. Over 3.5 million cubic yards of waste were landfilled during that time.

All during this time, as the volume and variety of waste increased, what was there began to decompose. The decomposition process resulted in the waste returning to its base constituencies. This further led to a complex and ill-defined mass of substances.

All of this waste also contained a certain amount of water which mixed with the base elements from the decomposition process to create what the experts call leachate but which may fairly be described as toxic soup. This "soup" eventually intermixed from various locations throughout the landfill and worked its way into the surrounding soil and finally into the groundwater. And like grandma's special soup, the final product was the result of a unique blend of ingredients, some known and some unknown.

Now the parties ask, and the law requires, that this court analyze the "soup" and determine who put in which ingredients and how much. Like someone trying to figure out what makes Coke taste the way it does, this is no easy task. Unraveling a twenty-year process involving millions of cubic yards of waste and complex ecological, biological and geological forces is likely to yield less than precise results.

The parties have each taken a stab by offering their experts' opinions as to who should be responsible for what. But the expert opinions merely reflect the imprecision of the task at hand. And, of course, each parties "experts" ultimately arrive at conclusions which most favor their clients. For example, plaintiffs conclude that volume should be the only basis for allocating responsibility. Defendants, on the other hand, preach toxicity and cost causation as the way to go.

Further complicating matters, is the evolving nature of the law itself and its application to this particular landfill. In the early and midyears of the landfill, the law was in its embryonic stages. Techniques for operating a landfill, which today seem archaic, were acceptable back then. Methods that

were approved ten to twenty years ago are being rejected today. It is difficult to attribute fault on such a sliding scale. Much of what was done acceptably back then is now improper when viewed through the lens of today's regulatory schemes.

Additionally, as to the many issues raised in this case, most of which ultimately bear on the allocation issue, there is little guidance in the way of case law, particularly at the appellate level. This is most likely due to the fact that many of these cases settle. The high rate of settlement is probably attributable to the inherently unpredictable results a trial will bring. Further, most of the cases performing allocations rightfully caution that each case is unique and should provide little, if any, guidance in future allocation matters. Given the dearth of cases on many of the issues, combined with the less than precise language of CERCLA itself, the court is plowing new ground on many issues. The bottom line is the court is left with an underdeveloped legal framework in which to resolve the many issues raised by the parties.

Of course, because an allocation in a CERCLA contribution action is an equitable matter, the court may take into consideration all relevant conduct of the parties that might demonstrate fault on their part. This results in an inordinate amount of mudslinging in an effort to make each party look like the bad guy. Unfortunately, this has a tendency to detract from other issues in the case which require the parties' and the court's attention. Not only that, but neither party comes out smelling like a rose. There is ample evidence that all parties failed to play entirely by the rules (some of which were surely changed in the middle of the game) and also contributed significantly, whether by volume or toxicity, to the contamination at the landfill.

After having analyzed many cases, considered numerous articles, reviewed volumes of evidence and studied the post-trial briefs, the court concludes that the allocation in this case will be a "best guess" proposition within the exercise of its discretion. The court will, of course, make every effort to carefully consider all relevant factors in assessing responsibility. Ultimately, however, that assessment will be limited by the nature of what must be considered. And, as has been said many times before, the allocation arrived at here should not be applied to other factual scenarios in other cases.

Both parties in this case have presented their suggested methods of allocating response costs. In support of their respective positions, they have submitted testimony and reports from allocation experts. In turn, the experts have rendered allocation opinions that are based on percentages attributable to the various classes (owners, operators, generators and transporters) and then percentages within each of the classes. Additionally, the experts take into consideration various equitable factors, each giving different factors varying amounts of weight in arriving at their final conclusions.

While the court appreciates the efforts of the parties and their experts, ultimately the equitable allocation of response costs belongs to the court. As discussed previously, this is a task immune to precision. Although dollars are at issue, and, hence, numerical divisions are inevitably called for, any numerical assessment will be illusory at best.

That being said, there are several propositions that the court will definitively apply in allocating costs in this case. First, the court does not find volume alone to be an adequate

measure of allocation. Such an approach ignores many other relevant factors, the most important of which is the conduct of the parties. Second, although defendants' cost allocation approach is much more expansive in its application, the court cannot agree with defendants' emphasis on toxicity. While the knowing placement of toxic substances in the landfill reflects relevant conduct of the parties, any effort at quantifying toxicity as it relates to the ultimate problems at the landfill is nearly impossible under the disputed testimony of the experts in this area. Finally, while both parties' experts' approaches have some redeeming qualities and take into consideration some relevant conduct, they are, in their efforts to identify waste streams and establish a nexus between those streams and the ultimate clean-up costs, somewhat wanting. After considering the experts' testimony and reports, the court is convinced that there are significant limits as to the qualitative and quantitative conclusions that can be reached in this case.

The court finds that the truest measure to assess equitably the liability in this case is to consider the conduct of the parties as it relates to their respective categories of owner, operator, generator and transporter. In other words, liability should be based on a percentage of fault rather than a percentage of volume or a percentage based on a particular waste stream. Such factors that bear on fault include: (1) how much waste was contributed; (2) the type and nature of the waste; (3) compliance with regulatory schemes; (4) operation of the landfill, including closure and post-closure activities; and (5) cooperation and involvement in cleaning up the site. The court will consider each of these factors and others as it applies to the relevant conduct of the parties. This will provide an evidentiary basis for the allocation. Once that

task is accomplished, the court will then assess a percentage of liability to each of the parties based on their relevant conduct as it relates to the condition of the landfill and the related response costs.

It is first necessary to make an inter-class allocation between the four statutory groups: owners, operators, transporters and generators. The court will assess a percentage of liability to each of these groups.[25] Once that is accomplished the court will determine the percentage of liability on an intra-class basis.

The first group the court will consider are the transporters. The court considers the transporters to have the most tenuous connection to the site.[26] They merely hauled waste to the site. They, with the exception of BFI and AAA, had no involvement in how the site was operated or whether the site operators complied with applicable regulations. On the other hand, they were necessary players in the creation of a massive garbage pile. The court finds, based on their relative contribution to the site in terms of bringing the waste there, that the transporters should be assessed a ten percent share of the present and future clean-up costs.

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[25] Plaintiffs' and defendants' allocation experts, Hengemihle and Wise, agree that fifty percent of the liability based on volume should be allocated to the generator/transporter class. Taking this into consideration, the court, along with all the other evidence of fault, makes its independent allocation as to these two classes.

[26] The exception, of course, is BFI and AAA who were also operators of the site.

Turning to the generators, they were responsible for the waste in the first place. The waste, without which there could be no landfill, was the by-product of the generators' various operations, whether private or governmental. While they had no involvement with the operations of the landfill, they cannot avoid significant liability based on the sheer volume of the waste they created and contracted to have taken to the site. The court finds the volume of waste of the generators is the best method under the facts to determine fault of the generators. Accordingly, the court allocates forty percent of the present and future clean-up costs to the generator class.

That leaves the owners and operators. While the court will allocate a separate percentage of the entire liability to each of these groups, the court emphasizes that the owners group is, next to the operators, the most intimately related to the site in this case. The site was located on the farm where they resided and conducted other business operations. They were present at or near the site from time to time and were in a position to observe operations. Further, they received copies of various correspondence between the operators and state regulatory agencies concerning operations at the site and compliance with regulations. They also held regular meetings with the Ter Maats as to the status of the site and negotiated payment terms based on the volume of the waste going into the site. Over the entire period of the landfall operation they received payments of over one million dollars. Based on these circumstances, the court allocates a share of five percent of the present and future cleanup costs to the owners.

What remains is a forty-five percent share of the present and future costs to be allocated to the operators. The

court finds this to be an appropriate share based on the extensive involvement of the operators in creating and managing the landfill. It was the operators who held the lion's share of responsibility for what went into the site, how it went in, where it went in and what happened to it after it went it. The operators also had primary responsibility for ensuring compliance with state and federal regulatory schemes. A forty-five percent allocation is an entirely appropriate assessment of liability to the operators.

There remains, of course, the issue of intra-class allocation as between BFI and MIG/AAA as operators and transporters. The court will first address the operator allocation issue. This allocation, which will be based on a whole percentage of the forty-five percent operator class share,[27] will reflect consideration of the five aforementioned factors relevant to the fault of each. Once the relevant factors are discussed as to each, the court will arrive at a percentage for each.

As to the volume of waste, it is evident that the largest amount of waste was placed in the site during the MIG/AAA period of operations. Roughly 83 percent of the total volume of waste in the landfill was placed there during the MIG/AAA operation. Approximately 17 percent went in under the BFI era.[28]

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[27] This is exclusive of the orphan share attributable to the operator class.

[28] The court recognizes that about one percent was placed there during the brief period that Kennedy/Mollendorf operated the site pre-1971. This amount is of no import to the present

Of course, these figures do not account for the approximately 3.4 million pounds of solvent-bearing waste brought to the site by BFI during its operating period. There is no evidence to quantify how the 3.4 million pounds of solvent waste computes into volume. Nonetheless, while the court will not strain to adjust the estimated percentages of volume, the court considers the additional Chrysler waste to have a volumetric impact significant to its assessment of this factor. In other words, BFI's liability will be based in part on the additional volume of waste it contributed to the site via the Chrysler solvent waste.

The next factor is the type and nature of the waste. For the most part, this factor is a wash as the waste going into the site during the BFI and MIG/AAA periods was a homogeneous stream of residential, commercial and industrial garbage. This factor would have little effect on the allocation equation except for the Chrysler solvent waste attributable to BFI. This waste was highly toxic and contributes to the groundwater contamination at the site. That is not to say, however, that the VOCs and SVOCs at the site all came from Chrysler waste. Some surely came from the other waste placed there. But it is undeniable the toxicity of the Chrysler waste had a significant impact at the site.

The Chrysler waste was also in liquid and semi-liquid form which would have accelerated its trip to the groundwater. The liquidity of the Chrysler waste would also have added to the mobility of other contaminates at the site. It did little good to place cover over the site to keep liquid out

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allocation.

when liquid was being placed into the site. The court finds this factor to weigh heavily in its assessment of liability to BFI.[29]

The third relevant factor is the parties' compliance with applicable regulatory schemes. The court will first point out that it gives virtually no weight to the evidence of the IEPA's reports of non-compliance of MIG/AAA based on blowing litter at the site. This case is clearly not about blowing litter.

There is also evidence that MIG/AAA pumped leachate from the retention pond back over the landfill and that this was in violation of applicable regulations. While this fact will have more significance when the court discusses how the landfill was operated, it causes less weight under this factor as the evidence shows the IEPA was aware of the practice and allowed it to go on.

The fact that BFI placed Chrysler solvent waste into the site without obtaining the proper permits weighs heavily against BFI. It is one thing to allow litter to blow around, it is entirely another to dispose of over 3 million pounds of solvent waste knowing that the regulatory agencies were unwilling to allow such disposal.

Finally, as for the issue of BFI's failure to remove the waste deposited in the Kennedy/Mollendorf area prior to

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[29] The expert testimony does not clearly establish the impact of the nature and toxicity of Chrysler waste at the site.

1971, such non-compliance with their operating permit is minimized somewhat by the IEPA's knowledge of their non-compliance and its apparent willingness to allow it. While such noncompliance is relevant, it is not particularly weighty.

That brings the court to the issue of how BFI and MIG/AAA operated the site, including closure and post-closure conduct. As for BFI, its most significant downfall was the placement of 3.4 million pounds of liquid and semi-liquid solvent waste at the site. Without a doubt, this contributed substantially to contamination at the site. Exactly how much, no one will ever know. But as discussed earlier, exactness is neither obtainable nor necessary in this case.

BFI also failed to excavate the Kennedy/Mollendorf waste which was located in what was once a gravel pit. While there was evidence on both sides of the issue, the court finds that the Kennedy/Mollendorf area was, to some degree, exposed to the groundwater, at least during the spring when water levels were higher. This finding is reinforced by the IEPA's requirement contained in BFI's operating permit that the waste in the Kennedy/Mollendorf area be excavated and moved to another part of the site. This failure to excavate the waste allowed leachate from the waste a much more efficient access to the groundwater. While it is not established from the evidence where this groundwater moved within or adjacent to the site, it is clear that it contributed to the overall contamination of the site.

As for MIG/AAA, their big downfall was the state in which they left the site upon their abandonment in June 1988. The court has already assessed a good measure of liability to MIG/AAA for the emergency removal and IRM costs based

on this factor. However, the court also finds that failure to properly close the site contributed to contamination at the site that will need to be addressed independent of the emergency removal and IRM costs. Although such contamination is arguably minimal as compared to the site as a whole, its relevance cannot be ignored.

The last factor the court will consider is the level of cooperation and involvement in clean-up of the site. This factor clearly inures to the benefit of BFI and the significant detriment of MIG/AAA. BFI has been a lead performer in the site clean-up while MIG/AAA abandoned the site and refused to cooperate with, or contribute to, the clean-up effort. The sooner and more thoroughly a site can be cleaned up, the less severe its impact will be on the environment. MIG/AAA's recalcitrance is entirely antithetical to the spirit and purpose of CERCLA and other regulatory statutes. The failure of MIG/ AAA to provide relevant site information also hindered the clean-up process. The court finds MIG/AAA's lack of cooperation and involvement in the clean-up to weigh heavily in favor of allocating them a greater share of costs.

Having considered these various factors carefully, the court must now arrive at a percentage of fault attributable to BFI and MIG/AAA as operators. As emphasized earlier in this order, such task escapes any degree of precision. It is, at best, a matter of "Kentucky windage," grounded on the relevant conduct of the parties. Keeping in mind its discussion of the foregoing factors, the court allocates forty percent of the remaining 44.63 percent of the overall costs to BFI and sixty percent of the remaining 44.63 percent to

MIG/AAA.[30] When the orphan shares are distributed using Hengemihle's methodology, this equates to 18.21 percent of the overall costs to BFI and 27.14 percent of the overall costs to MIG/AAA.[31]

Turning to BFI and AAA as transporters, the court allocates sixty percent of the 7.77 percent share to AAA and forty percent to BFI.[32] The court bases this allocation on the volume attributable to BFI and AAA as transporters, including the additional Chrysler waste this court has found BFI liable for. Additionally, the court considers not only the added volume of the Chrysler waste but also its toxicity. In doing so, the court recognizes, as it did in allocating the operator share between BFI and MIG/AAA, that it is impossible to quantify with precision the precise impact of the Chrysler waste on either the volume at, or the condition of, the landfill. When the orphan shares are distributed using Hengemihle's methodology, this equates to 4.74 percent of the overall costs to AAA and 4.21 percent of the overall costs to plaintiffs.

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[30] The non-orphan share attributable to the operators is 44.63 percent.

[31] Because the court can find no discernable difference in the conduct of MIG and AAA as operators, the court allocates 13.57 percent (1/2 of 27.14) to MIG and 13.57 percent to AAA.

[32] Of the ten percent attributable to the transporter class as a whole, 1.02 percent represents the transporters who settled with plaintiffs and 1.21 percent represents the orphan transporter share. Therefore, the allocation is based on the remaining 7.77 percent.

The total past IRM costs through December 31, 1997 with prejudgment interest are $2,754,549.62. Eighty-five percent of this total is $2,341,367.18 to be split evenly between MIG and AAA. The total past non-IRM costs through December 31, 1997 with prejudgment interest are $6,615,026.56. MIG is also responsible for 13.57 percent of this amount, or $897,659.10. AAA is also responsible for 18.31 percent (4.74 percent as a transporter and 13.57 percent as an operator) of this amount, or $1,211,211.36. Consequently, MIG's total share of past response costs incurred by plaintiffs through December 31, 1997 (with interest) is $2,068,342.70, while AAA's total share is $2,381,894.95. MIG is responsible for 42.50 percent of all IRM costs and 13.57 percent of all other site costs incurred after December 31, 1997 which are consistent with the NCP. AAA is responsible for 42.50 percent of all IRM costs and 18.31 percent of all other site costs incurred after December 31, 1997 which are consistent with the NCP.

Judgment is therefore entered for plaintiffs and against MIG Investments, Inc. for $2,068,342.70 in site costs incurred through December 31, 1997, and for 42.50 percent of all IRM costs and 13.57 percent of all other site costs incurred after December 31, 1997 which are consistent with the NCP. Judgment is further entered for plaintiffs and against AAA Disposal Systems, Inc. for $2,381,894.95 in site costs incurred through December 31, 1997, and for 42.50 percent of all IRM costs and 18.31 percent of all other site costs incurred after December 31, 1997 which are consistent with the NCP.

APPENDIX H

Comprehensive Environmental Response, Compensation, and Liability Act

42 U.S.C. §9601(20)(A)

§9601. Definitions
For purposes of this subchapter –

.....

(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

42 U.S.C. §9607(a)

§9607. Liability
(a) Covered persons;

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section –

.....

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, ...

shall be liable for –

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from a release; and
(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C. §9613

§9613. Civil proceedings

(f) Contribution
(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a)

of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claim shall be brought in accordance with this section and the Federal Rules of Civil Procedure and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.